No. 04-698

Title: Brian Schaffer, a Minor, By His Parents and Next Friends, Jocelyn and Martin Schaffer, et al., Petitioners

v.

Jerry Weast, Superintendent, Montgomery County Public Schools, et al.

Docketed: November 24, 2004
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (03-1030)
Decision Date: July 29, 2004
Rehearing Denied: August 24, 2004

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Nov 19 2004	Petition for a writ of certiorari filed. (Response due December 27, 2004)
Dec 8 2004	Order extending time to file response to petition to and including January 21, 2005.
Jan 21 2005	Brief of respondents Jerry Weast, Superintendent, Montgomery County Public Schools, et al. in opposition filed.
Jan 21 2005	Brief amici curiae of Virginia, et al. filed.
Feb 1 2005	Reply of petitioner Brian Schaffer, a minor by his parents and next friends, Jocelyn and Martin Schaffer, et al. filed. (Distributed)
Feb 2 2005	DISTRIBUTED for Conference of February 18, 2005.
Feb 22 2005	Petition GRANTED.
Mar 10 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including April 29, 2005.
Apr 29 2005	Brief amici curiae of Various Autism Organizations filed.
Apr 29 2005	Joint appendix filed.
Apr 29 2005	Brief of petitioners Brian Schaffer, a minor by his parents and next friends, Jocelyn and Martin Schaffer, et al. filed.
Apr 29 2005	Brief amici curiae of Council of Parent Attorneys and Advocates, et al. filed.
Apr 29 2005	Brief amicus curiae of Virginia, et al. filed.
Apr 29 2005	Brief amici curiae of ARC of the United States, et al. filed.
May 12 2005	Extension of time within which to file respondents' brief on the merits to and including June 24, 2005.
Jun 23 2005	Brief amici curiae of Virginia School Boards Association and Five Other Board Associations filed.
Jun 24 2005	Brief of respondents Jerry Weast, Superintendent, Montgomery County Public Schools, et al. filed.

Jun 24 2005	Brief amici curiae of Council of the Great City Schools, et al. filed.
Jun 24 2005	Brief amicus curiae of United States filed.
Jun 24 2005	Brief amicus curiae of National School Boards Association filed.
Jun 24 2005	Brief amici curiae of Hawaii, et al. filed.
Jul 8 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 20 2005	CIRCULATED.
Jul 20 2005	SET FOR ARGUMENT on Wednesday, October 5, 2005.
Jul 29 2005	Reply of petitioners Brian Schaffer, a minor by his parents and next friends, Jocelyn and Martin Schaffer, et al. filed. (Distributed)
Aug 2 2005	Record received from U.S.C.A.- Fourth Circuit. (1 envelope)
Aug 17 2005	Lodging proposal received from counsel for petitioners.
Aug 22 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Aug 23 2005	Lodging proposal approved.
Aug 24 2005	Response to petitioners lodging proposal received and circulated.
Aug 26 2005	LODGING consisting of 20 copies of the following documents: Position Statement of NCD, Letter of S. Sullivan dated 5/25/05, and the Amicus Brief of the United States in the 4th Circuit, received from counsel for the petitioner.
Sep 26 2005	Record received from U.S.D.C. of Maryland (Greenbelt). 1 Box
Oct 5 2005	Argued. For petitioners: William H. Hurd, Richmond, Va. For respondents: Gregory G. Garre, Washington, D.C.; and David B. Salmons, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

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Supreme Court, U.S.
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In The

Supreme Court of the United States

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BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,

Respondents.

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On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

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PETITION FOR WRIT OF CERTIORARI

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WILLIAM H. HURD*
SIRAN S. FAULDERS
TROUTMAN SANDERS, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)
**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG & ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

LIST OF PARTIES

The petitioners are Jocelyn Schaffer and Martin Schaffer, appearing in their own right and as parents and next friends of their son, Brian Schaffer.

The respondents are Jerry Weast, Superintendent of the Montgomery County Public Schools, and the Board of Education of Montgomery County, Maryland.

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PETITION FOR WRIT OF CERTIORARI

The petitioners – parents of a disabled child – respectfully petition the Court for a writ of certiorari to review the judgment of the court of appeals, which ruled that parents – rather than the school district – must bear the burden of proof at an administrative hearing, held under the Individuals with Disabilities Education Act, to assess the appropriateness of an individualized education program.

OPINIONS BELOW

There are six opinions below, culminating in the court of appeals ruling that is the subject of this petition. In chronological order, they are as follows:

- In 1998, the administrative law judge ("ALJ") imposed the burden of proof on the parents and ruled for the school district on the merits of the child's individualized education program ("IEP"). This unpublished decision is reprinted in the Appendix at App. 113.

- In 2000, the district court reversed the ALJ on the burden of proof issue, placed the burden on the school district, and remanded the case for further proceedings. This decision is published as *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). It is reprinted at App. 54.

- In 2000, with the burden of proof placed on the school district, the ALJ ruled for the parents on the merits, holding that the IEP proposed by the school district was inappropriate. This unpublished decision is reprinted at App. 70.

- In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court's 2000 decision and remanded the case for further proceedings.

The opinion is found at *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (*per curiam*). It is reprinted at App. 50.

- In 2002, the district court again placed the burden of proof on the school district, and it affirmed the ALJ's 2000 ruling for the parents on the merits. This opinion is published as *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002). It is reprinted at App. 21.

- Finally, in 2004, a divided court of appeals reversed the district court on the burden of proof issue, imposed the burden on the parents and remanded the case. This decision – the subject of this petition – is published as *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004). It is reprinted at App. 1. The dissent of Judge Luttig is reprinted at App. 16.

An unpublished denial of rehearing *en banc* is reprinted at App. 164. An order of the district court – following remand – to stay proceedings in that court pending disposition of this petition is reprinted at App. 163.

JURISDICTION

The panel decision of the court of appeals was entered on July 29, 2004. The decision of the court of appeals denying the petition for rehearing *en banc* was entered on August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Reprinted in the Appendix is § 1400, which contains congressional findings as well as the purpose of the IDEA. App. 166. Also reprinted is § 1415, which contains procedural safeguards, including the § 1415(f) requirement for

an "impartial due process hearing." App. 174. The IDEA is silent on the burden of proof at such a hearing.

STATEMENT OF THE CASE

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). Those funds are then re-allocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school system to abide by certain procedural and substantive standards in developing individualized education programs ("IEPs") for children with disabilities.[1]

The procedural standards preclude school officials from making unilateral decisions about a child's IEP. Instead, such decisions must be made by school officials and parents in collaboration, with both parties having significant rights of appeal through administrative and judicial channels. If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an "impartial due process hearing" – to bring the issue before a neutral hearing officer or administrative law judge for resolution.[2] Any party aggrieved by the results of the administrative hearing may appeal to a state court of competent jurisdiction or to a federal district court.[3]

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[1] The IEP is a written document developed by an IEP team that includes, *inter alia*, the child's parents, his teacher and local school division representatives. 20 U.S.C. § 1414(d). The IEP contains a statement of how the child's disability affects the child's involvement and progress in the general curriculum, a description of specific educational services to be provided to the child, annual goals, and objective criteria for evaluating progress. *Id.*

The Petitioners' Child

There is "no question" that Brian Schaffer has multiple disabilities. App. 56. He is "learning disabled, language-impaired and other health impaired." App. 24.[4] In addition, he has Attention Deficit Hyperactivity Disorder. App. 24.[5] From pre-kindergarten through the seventh grade, Brian attended an independent school, Green Acres School.[6] The tuition was paid by his parents, Jocelyn

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[2] 34 C.F.R. § 300.507(a)(1) ("A parent or a public agency may initiate a hearing on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).").

[3] *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review. 34 C.F.R. § 361.57(g). However, Maryland has not implemented this option.

[4] The term "other health impairment" incorporates a broad array of disabilities. Defined by federal regulation, the term means:

> having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.7(c)(9).

[5] Now 20, Brian was only 14 when this case began. App. 118, 133.

[6] Like his older brother and sister, Brian eventually attended – and ultimately graduated from – the public schools of Montgomery County.

(Continued on following page)

Schaffer and Martin Schaffer. At Green Acres School, Brian had the benefit of small class size and significant accommodations, as well as extra services provided by his parents. Despite these services, he did not succeed. App. 24. In the fall of 1997, when Brian was in the seventh grade, Green Acres School concluded that he should attend a school that could more adequately accommodate his disabilities. App. 120. It was then that Brian's parents turned to the Montgomery County Public Schools ("the school district") and began to seek an appropriate placement for the following school year. App. 24.

The school district agreed that, under the IDEA, it was obligated to provide Brian with special education and related services. Even so, the school district rejected the conclusions of the outside experts who had evaluated Brian and the recommendations of the Green Acres teachers who had worked with him. Instead, the school district accepted the rosier and less informed views of its own employees, who had never taught the child.[7] Thus, there was disagreement about the nature of Brian's disabilities and, as a result, there also was disagreement about the services he required.

However, given the initial failure of the school district to provide an adequate IEP, his public school attendance came several years after the events giving rise to this case, when the school district's reviewing team finally decided that Brian's parents and outside experts had been correct in their insistence that Brian needed small classes. *See* Record, Docket Entry 41 (Dec. of J. Schaeffer and Exhibits); Docket Entry 45 (Mot. for Sum. J. at 22 n.7).

[7] The ALJ later faulted the school district because "[its] expert made no effort to contact the Parents' experts and discuss the reports and recommendations [of the parents' experts]. Lack of contact by [the school district's] experts with the Parents' experts may have played a role in the failure by [the school district] to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement." App. 157.

According to the outside experts, Brian suffered from a "unique central auditory processing deficit." App. 151. Thus, he needed "small, self-contained special education classes" that would "minimize the distractions interfering with his ability to learn." App. 25.[8] This finding was consistent with Brian's experience at Green Acres School, where he performed much more successfully in a class of 7 or 8 students than he did in his other classes, which did not exceed 15 to 16 students. *See* Record, Hearing of June 16, June 23, and July 2, 1998, before ALJ Stephen J. Nichols, Transcript 143, 530-31, 559, 574-77.

By contrast, the school district's employees did not believe that Brian had a central auditory processing problem.[9] In their view, he only had a "mild speech-language disability" and, thus, did not need the more intensive accommodations recommended by the outside experts. App. 26. As a result, the IEP proposed by the school district called for Brian to be taught most of his academic subjects in a large classroom with 24-28 other students. For some subjects, the school district simply planned to place Brian in a regular classroom. App 133. For other subjects, his classroom would use an "inclusion model" with two teachers, one of whom would work with 5-6 special education students in the midst of the other students and larger setting. App. 130. The larger class size and "inclusion model" formed the centerpiece of the IEP offered by the school district. *See* App. 130-134.

In light of Brian's severe learning deficits and the advice of those experts most familiar with him, the parents advised the school district that its IEP was "insufficient to meet his identified needs." Rejecting the proposed IEP in May of 1998, Brian's parents requested an administrative due process hearing. App. 25. Anticipating a protracted dispute, they also enrolled Brian for the 1998-99 school year at the McLean School, where they had previously reserved a space. McLean is a private school in Montgomery County that accommodates learning and language-disabled students in small classes. App. 25.

Because the school district did not offer Brian an appropriate education in the public schools, Brian's parents sought reimbursement from the school district for the tuition and expenses they paid to the McLean School.[10] App. 22. *See School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (holding that IDEA authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."). Brian's parents also pursued their claim in order to obtain a favorable decision that would enable their child to receive an appropriate education from the school district in the coming years.

The ALJ's First Decision

The administrative hearing lasted three days. As directed by the ALJ, each side filed briefs on the burden of proof. App. 57. Each side argued that the burden should be borne by the other. Each side also presented expert testimony supporting its position on the merits. The outside experts, Brian's parents and educators from Green Acres School explained that the school district's plan was deficient; the school district's witnesses disagreed. After weighing the conflicting evidence, the ALJ concluded that the outcome of the case depended on which side had the burden of proof:

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[8] A discussion of the outside experts by the ALJ appears at App. 121-23, 134, 146-52.

[9] A discussion of the school district's experts by the ALJ appears at App. 126-27, 146-52.

[10] Although Brian graduated from high school in 2003 and is no longer eligible for IDEA services, this case nonetheless presents a continuing controversy because petitioners seek reimbursement for the costs they incurred in providing their son the appropriate education services that the school district refused to provide. These costs total thousands of dollars for eighth grade alone. *See Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1, 4 n.3. (1993) (holding that claim for reimbursement preserves case as live controversy despite student's graduation).

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, *an assignment of the burden of proof in this case becomes critical.*

App. 94 (emphasis added).

The ALJ recognized that "[t]here is no clear authority" on who bears the burden of proof and that "[t]he case law provides support for assigning that burden to either party." App. 94. Outlining a split that has now grown much wider, the ALJ noted that some circuits place the burden of proof on the school district. *Id.* On the other hand, he explained, other circuits place the burden on the parents. App. 94-95. Confronted by the conflicting authorities, the ALJ elected the latter course and concluded that "the *Parents* bear the burden of persuasion." App. 96 (emphasis added). Thus, the petitioners were required to show that the IEP prepared by the school district did not offer Brian a FAPE. Having thus imposed the burden of proof on Brian's parents – and viewing the burden as "critical" to the outcome – the ALJ then concluded that the parents had failed to meet their burden. App. 106. Thus, he ruled for the school district on the merits of the case, approving the school district's plan for Brian and denying the parents' request for tuition reimbursement. App. 107.

The District Court – First Decision

Brian's parents appealed the ALJ's decision to the United States District Court for the District of Maryland.[11] There they prevailed. Reversing the ALJ on the burden of proof issue, the district court placed the burden on the school district and remanded the case back to the ALJ for further proceedings under the corrected standard. In so ruling, the district court relied heavily on an IDEA case decided by the New Jersey Supreme Court, *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District,* 560 A.2d 1180, 1188 (N.J. 1989).[12]

Lascari is a seminal case explaining why the school district should *always* bear the burden of proof. Even so, on the facts before it, the district court found that it did not need to go so far as *Lascari*. Adhering to a middle course, the district court distinguished between two types of cases – those involving an *initial* IEP and those involving a proposed change to an *existing* IEP. With regard to an initial IEP, the district court ruled that *the school district* should have the burden of proof at the administrative hearing. However, "where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change." App. 68. This distinction was later obliterated by the sweeping language of the Fourth

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[11] *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of an ALJ], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). It is this statute that provided the basis of jurisdiction for the original action in district court.

[12] All but ignored by the two judges forming the Fourth Circuit majority, *Lascari* figures prominently in the split among lower courts. *See infra* at 25.

Circuit, which apparently places the burden on the parents in *all* cases when they challenge a proposed IEP. *See infra* at 14.

The ALJ's Second Decision

When the remanded case came back to the ALJ, no new evidence was presented. Thus, the "weight of the evidence" again "rest[ed] in equipoise." App. 148, 152. With the burden now shifted to the school district, the ALJ ruled for the parents, concluding that the IEP failed to provide Brian with meaningful educational benefit. App. 153. As the ALJ explained, "[Brian's] learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child." App. 134.[13] Thus, the ALJ concluded:

> [A]s a matter of law . . . [1] the April 6, 1998 IEP was not reasonably calculated to provide "significant learning" and "meaning[ful] educational benefit" and [2] the placement(s) offered by [the school district] were not appropriate and failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year as required by [the] IDEA.

App. 158. Having ruled that the school district's plan was inadequate, the ALJ awarded the parents *half* of the tuition they expended to obtain an appropriate placement for Brian for the 1998-99 school year. App. 158. Neither side found this decision satisfactory, and both appealed to the district court.[14] Meanwhile, other proceedings were underway in the court of appeals.

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[13] The ALJ also determined that the "inclusion model" proposed by the school district actually would be counter-productive. App. 134. He also found that the school district's proposal fell short in other ways. For example, "[t]he IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem." App. 134-35.

The Court of Appeals – First Decision

While the case was before the ALJ on remand, the school district was simultaneously appealing the district court's 2000 decision to the Fourth Circuit. Although not critical to the outcome, this stage of the litigation is significant because of the involvement of the United States. Filing an *amicus* brief in support of the parents, the United States argued that the burden should be placed on the school district.[15] To do otherwise, the United States said, would "unhinge [the] statutory framework" created by Congress. Brief for *Amicus Curiae* United States ("U.S. *Amicus* Brief") at 5, *Schaeffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (No. 00-1471). The government gave two overarching reasons for placing the burden of proof on the school district.

First, the United States concluded that such an approach furthers the IDEA's goal of providing a free appropriate public education to children with disabilities. U.S. *Amicus* Brief at 6. As the government explained:

- "[A]llocating the burden of proof to the parents would undermine the IDEA's provisions that ensure parents meaningful participation in developing the IEP."

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[14] As in the first appeal to the district court, the basis for jurisdiction was 20 U.S.C. § 1415(i)(2)(A). *See* n.11, *supra*.

[15] The United States has not participated in later stages of the case.

- "[A]ssigning the burden of proof to the school is consistent with the IDEA's overall objective . . . by serving as an additional incentive for school officials to draft IEPs that provide FAPE to children with disabilities."
- "[B]ecause the IDEA contemplates that the school would take the lead in . . . proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide FAPE to a child with a disability."

Id. at 12.

Second, the United States noted that principles of fairness support allocating the burden to the party with greater access to necessary evidence. U.S. *Amicus* Brief at 14. As the government explained:

> [C]ourts have often allocated the burden of proof to the party other than the one challenging an agency action in order to accommodate statutory priorities or to protect certain interests, in accordance with the Supreme Court's general standard allowing burden shifting according to "policy and fairness based on experience."

Id. at 13-14 (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973)). Protecting those interests in the context of the IDEA means placing the burden of proof on the school district because "the school is in a better position to prove the appropriateness of its proposed IEP." U.S. *Amicus* Brief at 16.[16]

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[16] The United States relied, in part, on Engel, *Culture, and Children with Disabilities*, 1991 Duke L. J. at 187-94 (arguing that parents are generally at a disadvantage vis-a-vis the school when

(Continued on following page)

By the time the court of appeals heard oral argument, the ALJ had already ruled in favor of the parents. Given this development, the court of appeals chose not to address the burden of proof until after the district court could hear an appeal from that ALJ ruling. Thus, the court of appeals vacated the district court's decision and remanded the case "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits." App. 52.

The District Court – Second Decision

The case then came back before the district court, with the remand from the court of appeals linking up with cross-appeals from the ALJ's second decision. On cross-motions for summary judgment,[17] the district court again ruled that, because the case involved "the parent's disagreement with an initial IEP," the school district had the burden of proof. The court supported the conclusion with the same rationale found in its first decision. App. 32. Concluding that the school district "did not provide Brian with FAPE for 1998-99," the court awarded the parents

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disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to the attachment to their child). U.S. *Amicus* Brief at 16.

[17] When an IDEA case is heard on appeal by a district court, the parties typically use cross-motions for summary judgment as the procedural mechanism to bring forward their competing claims for judgment based on the administrative record. This is so even when that record contains conflicting evidence. *See, e.g., Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002) ("Due to the unique procedural posture of these cases . . . summary judgment has been deemed appropriate even when facts are in dispute. . . ."); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004) (same); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (2003) (same). Use of this procedure is not an issue in this case.

full reimbursement for the tuition they paid in the 1998-99 school year. App. 41, 47. The school district then appealed to the Fourth Circuit, challenging the allocation of the burden of proof.

The Court of Appeals – the Decision at Issue

On appeal, the Fourth Circuit noted that the circuits are deeply split on how to allocate the burden of proof in administrative hearings under the IDEA. According to the panel majority, "[t]hree circuits assign the burden to the parents, and four (perhaps five) assign it to the school system." App. 7. Siding with the minority view, the divided panel reversed the district court and held – without qualification – that "parents who challenge an IEP have the burden of proof in the administrative hearing." App. 16.

In reaching this result, the panel majority began by recognizing a general principle governing the allocation of burdens of proof. It said: "Although 'the *natural tendency* is to place the burden[] on the party desiring change' or seeking relief, *other factors* such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." App. 6 (emphasis added) (quoting J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Despite the precedents and "other factors" urged by Brian's parents, the majority "[saw] no reason to depart from the general rule that a party initiating a proceeding bears [the] burden [of proof]." App. 15. Thus, it ruled for the school district and remanded the case back to the district court.

Judge Luttig dissented. Starting with the same general principle as the panel majority, he reached the diametrically opposite result. In his view, "[e]ach of these 'other factors' – policy, convenience and fairness – weigh against the assignment of the burden of proof to the

parents. . . ." App. 17. Agreeing with the district court, he concluded that "the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources." App. 16.

Judge Luttig also criticized the majority for being "unduly influenced" by the knowledge and sophistication of Brian's parents. App. 20. He explained that, for the "vast majority" of parents with disabled children, the IEP proposed by the school district will be "resistant to challenge" and the IDEA "will likely be obscure if not bewildering." *Id.* Moreover, unlike many other civil rights statutes, the IDEA "imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services." App. 18 (emphasis in original). Judge Luttig's recognition of this affirmative obligation dovetails with congressional finding that minority children with disabilities face special challenges. *See* 20 U.S.C. § 1415(c)(8)(A) ("[G]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."). Thus, "[w]ith the full mix of parents in mind," and realistically assessing the opposing parties relative abilities to present evidence and prove their case, Judge Luttig dissented from the panel majority. App. 20. Aligning himself instead with the majority of circuits, he concluded that "the proper course is to assign the burden of proof in due process hearings to the school district." *Id.*

Following the panel decision, the court of appeals denied a petition for rehearing *en banc*. App. 164. Upon remand, the district court stayed further proceedings pending disposition of this petition. App. 163.

REASONS WHY THE WRIT SHOULD BE GRANTED

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

***Brown v. Board of Education*, 347 U.S. 483, 493 (1954).**

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the IDEA. It is, however, a right that is meaningful only if parents are able to hold local school districts accountable at the administrative hearings that are made available under that law.

The ability of parents to hold school districts accountable is greatly affected by the answer courts have given to the question presented by this petition: which side has the burden of proof? Do the parents bear that burden? Or, is it more appropriate to place that burden on the school districts, which have the expertise to explain their decisions as well as an affirmative obligation to provide disabled children with education programs tailored to their individual needs?

It is a question that the IDEA does not explicitly address and on which the lower courts have given conflicting answers. The majority rule – adopted by six circuits and by the Supreme Court of New Jersey – is that the burden is rightfully placed on the school district. The minority rule – now adopted by four circuits – places the burden of proof on the parents. It is a question that this Court should now address.

There are three reasons why this petition should be granted. First, the lower courts are deeply divided on an issue of federal law. This fact alone makes this petition a worthy candidate for certiorari. Sup. Ct. Rule 10(a). Second, the issue is an important one, implicating the civil rights of those parents and children who depend upon the IDEA to obtain real educational opportunity. More than 3,000 administrative hearings are held under the IDEA each year. Many more are requested but ultimately cancelled when parents assess the difficulty of the process. And still many more children are affected by the parties' awareness of who will bear the burden of proof if negotiations fail. Third, this petition presents an ideal vehicle for resolving the issue. The split is mature. The case is not cluttered by collateral issues. The decision below – with its majority opinion and its dissent by Judge Luttig – neatly frames the issue for resolution by this Court.

I. THE DECISION BELOW EXACERBATES A MAJOR SPLIT AMONG THE CIRCUITS.

Ten circuits have addressed the question presented by this petition. Four circuits – now including the Fourth Circuit – have ruled that the burden of proof rests on the disabled child's parents. Six circuits have ruled that the burden rests on the school district. Additionally, in a decision distinguished by its depth of analysis, the New Jersey Supreme Court has placed the burden of proof on the school district. This is a deep split that should be resolved by this Court.

Courts Placing the Burden on Parents –

Before adding its own decision to the list, the Fourth Circuit recognized that three circuits place the burden of proof on the parents in administrative hearings under the IDEA.[18] These circuits are the Fifth, Sixth and Tenth.

Fifth Circuit – The first decision by the court of appeals addressing the burden of proof was *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom., Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).[19] There the Fifth Circuit actually placed the burden on the *school district* because it was the party seeking to change a previously agreed-upon IEP. As the court explained:

> [B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate. Since the school district has not even attempted to do so, its argument must be rejected . . .

Tatro, 703 F.2d at 830. In other words, *Tatro* treated the IEP as presumptively correct because it represented a bilateral agreement.

Three years later, the Fifth Circuit decided *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). Like *Tatro*, the

Alamo Heights case involved an attempt to modify an existing IEP; however, this time it was the parents who sought the change, and it was the parents who bore the burden. The Fifth Circuit declared:

> [T]he Act creates a "presumption in favor of the education placement established by [a child's] IEP," and "the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."

Id. at 1158 (quoting *Tatro*, 703 F.2d at 830) (second brackets added by Fifth Circuit). Although the Fifth Circuit explained its decision by quoting from *Tatro*, it failed to recognize that a major change was afoot. In *Alamo Heights*, the rationale for treating an IEP as presumptively correct was fundamentally altered. Where *Tatro* relied on the fact that the IEP was "jointly developed by the school district and the parents," *Alamo Heights* relied on what it called "the expertise of local education authorities." 790 F.2d at 1158. In other words, under *Alamo Heights*, an IEP must be treated as presumptively appropriate simply because the school district *says* it is appropriate. Bilateralism has been replaced by unilateralism. As a result, the Fifth Circuit is now among those circuits that always impose the burden of proof on parents.

Sixth Circuit – The burden of proof was first addressed by the Sixth Circuit in a pair of 1990 cases: *Cordrey v. Euckert*, 917 F.2d 1460 (6th Cir. 1990), and *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990). Standing by themselves, these cases appear to say that the burden should be placed on whichever party – the parents or the school district – seeks to change a previously agreed-upon

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[18] The federal law now known as the IDEA has been known by other names since it was first adopted in 1975, including the Education of the Handicapped Act (EHA) and the Education of All Handicapped Children Act (EAHCA). For the sake of consistency, this petition refers to the federal law as "the IDEA," even when the cited case uses one of the law's former names. This approach mirrors the one followed implicitly by the decision below and followed by other circuits as well. *See, e.g., Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915 n.2 (6th Cir. 2000) (explicitly adopting this approach to statutory nomenclature).

[19] The burden of proof was not an issue addressed by this Court when it ruled in the *Tatro* case.

IEP.[20] However, the Sixth Circuit later relied on these decisions to impose the burden on parents even where there was no previously existing IEP. According to the court, "[the child] and his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the Board is inappropriate." *Doe v. Bd. of Educ. of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993) (citing *Cordrey*, 917 F.2d at 1469; *Doe*, 898 F.2d at 1191) (emphasis added). Thus, while the rationale for its position is unclear,[21] the Sixth Circuit is plainly among those circuits that place the burden of proof on the parents.

Tenth Circuit – In *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), the Tenth Circuit said that "the burden of proof in these [IDEA] matters rests with the party attacking the child's individual education plan." *Id.* at 1026. In explaining the reason for its position, the Tenth Circuit did no more than quote from the Fifth Circuit's opinion in *Alamo Heights*, not recognizing that *Alamo Heights* distorted the rationale previously used by the Fifth Circuit in *Tatro*. *See supra* at 19. While thus adding to the number of circuits embracing the minority position, *Johnson* adds nothing to the persuasiveness of that position.[22]

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[20] *See, e.g., Cordrey*, 917 F.2d at 1469 ("Under this rule, [the child] and his parents would bear the burden of proof since they seek to add [extended school year] services to his IEP."); *Doe*, 898 F.2d at 1191 ("because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate") (quoting *Tatro*, 703 F.2d at 830).

[21] The decision below suggests that the Sixth Circuit imposes the burden on parents with respect to "both . . . procedural and substantive deficiencies" because that is the "traditional burden of proof." App. 7 (quoting *Cordrey*, 917 F.2d at 1466). However, a close reading of the cited passage shows that the "traditional" comment applies *only* to procedural compliance – not substantive compliance. Thus, the rationale for the Sixth Circuit's position on the burden of proof for substantive deficiencies remains elusive, and the Fourth Circuit's reliance on that position remains unpersuasive.

Courts Placing the Burden on the School District –

The Fourth Circuit said that four – "perhaps five" – circuits place the burden of proof on the school district. App. 7. These circuits include the Second, Third, Eighth, Ninth and District of Columbia Circuits. Not mentioned by the Fourth Circuit is the Seventh Circuit, which has also said that the school district bears the burden of proof. Noted but not discussed by the Fourth Circuit is the decision by the New Jersey Supreme Court in *Lascari*, which also places the burden of proof on the school district. App. 9. Each of these seven jurisdictions will be discussed in turn.

Second Circuit – In *Walczak v. Florida Union Free School District*, 142 F.3d 119 (2d Cir. 1998), the court placed the burden of proof on the school district. As it explained:

> Parents who are dissatisfied with a proposed IEP may file a complaint with the state educational agency. . . . Complaints are resolved through an

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[22] In a later case, the Tenth Circuit left open the possibility that the school district might bear the burden of proof where it is the party seeking to change a *previously agreed*-upon IEP. *See Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 930 (10th Cir. 1995) (noting that, given its disposition of the case, the court "need not decide" whether "the District bore the burden of proving that [an agreed upon placement] had become inappropriate for [the child] and that a change . . . was therefore necessary"). While this aspect of the burden of proof is not implicated by the facts of Brian's case, the Tenth Circuit's reservation on this point underscores the inappropriateness of the sweeping language used by the court of appeals in establishing a rule for the Fourth Circuit.

> "impartial due process hearing" . . . at which *school authorities have the burden* of supporting the proposed IEP. . . .

Id. at 122 (emphasis added). In imposing the burden on the school district, the Second Circuit relied on a series of administrative decisions including *Matter of the Application of a Handicapped Child*, 22 Educ. Dep't Rep. 487, 489 (1983) ("It is well established that a board of education has the burden of establishing the appropriateness of the placement recommended by [the school board]"). The Second Circuit continues to adhere to *Walczak*.[23]

Third Circuit – A leading case for placing the burden of proof on the school district is *Oberti v. Board of Education*, 995 F.2d 1204 (3d Cir. 1993). Analyzing the competing interests in some detail, the court explained:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

Id. at 1219. The court then went on to endorse the view that placing the burden of proof on the school is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens." *Id.* (quoting *Lascari*, 560 A.2d at 1188).

The precise question addressed in *Oberti* was which side has the burden of proof in an appeal to the district court; however, the principles on which the Third Circuit decided that question are broad enough to govern the administrative hearing as well. Indeed, the Third Circuit has relied upon *Oberti* for the principle that "[i]n *administrative* and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (emphasis added) (citing *Oberti*, 995 F.2d at 1219).

Seventh Circuit – The Fourth Circuit did not list the Seventh Circuit as one of the courts that has addressed the burden of proof issue; however, the Seventh Circuit has made it clear – albeit in *dictum* – that it regards the burden as properly placed on the school district. *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) ("The hearing officer correctly applied the burden of proof and found that the district satisfactorily showed that its proposed IEP was adequate under the IDEA.").

Eighth Circuit – In *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998), the court held that "[a]t the administrative level, the [School] District clearly had the burden of proving that it had complied with the IDEA." *Id.* at 569 (citing *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398-99 (9th Cir. 1994)).

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[23] *See, e.g., Grim v. Rhinebeck Cent. Sch. District*, 346 F.3d 377 (2d Cir. 2003) ("[T]he school district has the burden of demonstrating the appropriateness of its proposed IEP."); *Sherman v. Mamaroneck Union Free Sch. Dist.*, 330 F.3d 87, 93 (2d Cir. 2003) ("The School District bears the burden of proving that it has met [the IDEA] requirement" that "an IEP be 'reasonably calculated' to confer 'educational benefits.'"); *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96 (2d Cir. 2000) ("The School Board shoulders the burden of proof" on "whether the IEP was 'reasonably calculated' to confer 'educational benefits.'"); *M.C. v. Voluntown Bd. of Educ*, 226 F.3d 60 (2d Cir. 2000) ("Any such complaint is resolved through an 'impartial due process hearing' . . . at which school authorities have the burden of supporting the proposed IEP.").

The decision in *E.S.* was followed the next year by *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999), which also placed the burden on the school district: "At [the student's] administrative due process hearing the School District had the burden of proving that its proposed IEP would satisfy the requirements of the IDEA and provide [the child] with a free appropriate public education." *Id.* at 658 (citing *E.S.*, 135 F.3d at 658). Moreover, when asked to rehear the *Blackmon* case *en banc*, the Eighth Circuit declined to do so. 2000 U.S. App. LEXIS 965 (8th Cir. Jan. 25, 2000) (Nos. 99-1163/99-1288). Thus, it remains the law of the Eighth Circuit that the school district has the burden of proof.

Ninth Circuit – In *Clyde K. v. Puyallup Sch. Dist. No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994), the court entertained no doubts about where the burden of proof should be placed at a due process hearing, stating that "[t]he school clearly had the burden of proving at the administrative hearing that it complied with the IDEA." The Ninth Circuit continues to adhere to the *Clyde K.* decision that the school district has the burden of proof.

D.C. Circuit – In reviewing the split in the circuits, the court below was unsure how to treat the D.C. Circuit. Quoting *McKenzie v. Smith,* 771 F.2d 1527, 1532 (D.C. Cir. 1985), the Fourth Circuit said:

> [T]he D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as *procedurally deficient*, noting that "the underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education." It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the *substance* of the IEP is challenged.

App. 8 (emphasis added) (second brackets added by Fourth Circuit). There is, however, no uncertainty. The Board of Education for the District of Columbia has, *by regulation*, recognized its obligation to bear the burden of proof. The regulation provides that, in a due process hearing, "[t]he LEA [local education agency] shall bear the burden of proof, based solely upon the evidence and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." D.C. Mun. Regs. tit. 5, § 3030.3 (2004).[24] Arguably, this regulatory resolution of the issue removes the District of Columbia from the score card on how the circuits are aligned. However, the fact that the District of Columbia applies the IDEA in a manner contrary to its own institutional interests reinforces the doubts about the way in which the Fourth Circuit has construed that statute.

New Jersey – The decision below not only conflicts with the decisions of six other circuits, it also conflicts with the decision of the New Jersey Supreme Court in *Lascari v. Board of Education of Ramapo Indian Hills Regional High School District,* 560 A.2d 1180, 1188 (N.J. 1989). Echoed below in Judge Luttig's dissent, *Lascari* also provided much of the analysis upon which the district court relied in placing the burden on the school district. *See* App. 36-37.

In reaching its conclusion, *Lascari* discussed the federal policy at stake: "Through [the IDEA], Congress sought to ensure that school districts would be held accountable for the proper education of handicapped children, *a task the districts had previously ignored.*" *Lascari*, 560 A.2d at 1183 (emphasis added) (citing S. Rep. No. 94-168, 94th Cong., 2d Cong. Sess. 25-27, *reprinted in* 1975 *U.S. Code Cong. & Admin. News* (89 Stat.) 1449-50; *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982)). Given this background of neglect, placing the burden on the school district is "more consistent" with the IDEA and "protects the rights of handicapped children to an appropriate education." *Lascari*, 560 A.2d at 1188. Anticipating the views later expressed by the Third Circuit in *Oberti* and by the United States in its 2000 *amicus* brief, the *Lascari* court also supported its conclusion with practical considerations:

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[24] *See Scorah v. District of Columbia*, 322 F. Supp. 2d 12 (D.D.C. 2004) (applying a predecessor regulation placing burden of proof on the D.C. public school system).

> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.
>
> * * *
>
> The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP.
>
> * * *
>
> By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

Id. Thus, the court concluded that "the obligation of parents at the due process hearing should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate." *Id.*

In sum, the split is not only wide, it is also deep, pitting the rationale of *Lascari* and Judge Luttig against the rationale advanced by the panel majority. It is a split this court should now resolve.

II. ALLOCATING THE BURDEN OF PROOF IN IDEA CASES IS AN IMPORTANT ISSUE THAT THIS COURT SHOULD DECIDE.

Aptly described by the United States as "an important civil rights statute," U.S. *Amicus* Brief at 1, the IDEA is the principal vehicle by which educational benefits are provided to children with disabilities. It is, therefore, especially inappropriate for the law to be applied in the patchwork fashion created by the conflicting decisions on the burden of proof. Simply put, children and parents in some States have fewer or less effectual rights than their counterparts in other States, even though all were intended to be beneficiaries of the same national law. This Court should resolve the conflict.

The need for certiorari is underscored by the large number – and broad range – of disabled students served by the IDEA. The U.S. General Accounting Office ("GAO") recently noted that, nationwide, about 6.5 million children and young adults – aged 3 through 21 – receive special education services under the IDEA. GAO, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) ("GAO Report") at 1. These 6.5 million students are "about 13 percent" of the total number of students nationwide, and they include "a wide variety of needs that range from mild to severe." *Id.* at 5. As the GAO explained:

> Children with speech or language impairments, specific learning disabilities, emotional disturbance, hearing impairments (including deafness), visual impairments (including blindness), orthopedic impairments, autism, traumatic brain injury, other health impairments, or mental retardation, and who need special education and related services are eligible under [the] IDEA.

Id.

The GAO also reported that, "[w]hile national data on disputes are limited and inexact," more than *3,000* due process hearings are held each year. *Id.* at 1. Equally important is this comment from the U.S. Department of Education about the significance of a hearing:

> Due process hearings are expensive for all parties, time-consuming, and are not undertaken lightly, so *due process hearings are universally understood to be a marker of serious unresolved differences* about a student's need for special education and related services or the nature or location of services.

Id. at 29 (reproducing letter from Assistant Secretary of Education, R.H. Pasternack, Ph.D.) (emphasis added). Consistent with this observation about costs – and consistent with Judge Luttig's concern for the "vast majority of parents" – the GAO reports a "significant relationship" between household income and hearing requests. GAO Report at 15 n.22. Not surprisingly, households with lower income are less likely than households with higher income to request a due process hearing. *Id.* Indeed, it is these less privileged families who figure most prominently among the "full mix of parents" whose difficulties in coping with the IDEA led Judge Luttig to conclude that the burden of proof should be placed on the school district. App. 20. Imposing the burden on parents adds yet another obstacle to these families seeking to vindicate their rights under the law.

It is, however, not just those who actually participate in hearings who are affected by the burden of proof. Many more hearings are requested than are actually held. *See* GAO Report at 13 (noting that 11,068 hearings were requested in 2000, but only 3,020 were held). Such a discrepancy suggests that many parents find the process too daunting and simply capitulate. The difficulties parents encounter will be either exacerbated or ameliorated by the decision on where to place the burden. Indeed, the burden of proof can effect the outcome much earlier in the process. When parents and the school district sit down to negotiate the education program for a child, an awareness of who will bear the burden if no agreement can be reached can significantly affect the negotiation dynamics. Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies.

There is a manifest need for a uniform national rule on the burden of proof. Moreover, the rather extreme standard adopted by the Fourth Circuit – placing the burden on the parents *whenever* they challenge the school district – makes it especially appropriate that such a rule be established here. As a result of the decision below, school districts in five States will now be free to "ratchet down" services from previously-agreed levels, thereby confronting families with a dilemma: muster the costly resources necessary to mount a challenge or risk repeated cutbacks each year. Meanwhile, in two bordering circuits – the Third and the District of Columbia – the school district bears the burden, thereby creating an incentive for some families to relocate to obtain the services they need. A uniform rule is needed. Certiorari should be granted.

III. THIS PETITION PRESENTS AN IDEAL VEHICLE FOR DECIDING HOW TO ALLOCATE THE BURDEN OF PROOF.

Not only is the burden of proof an issue that should be resolved, this petition presents an ideal vehicle for resolving it. This is so for several reasons:

1. This petition comes at a time when the split is mature. Ten circuits have addressed the issue, and nothing would be gained by allowing it to percolate longer.

2. The case is not cluttered by collateral issues that could distract from the question presented or hinder its resolution. The burden of proof is the only issue addressed by the decision below.

3. By placing the burden of proof on the parents in all cases, the decision below stands in stark contrast with *Lascari*, which placed the burden on the school district in all cases. These "jurisprudential bookends" among the lower court decisions nicely highlight the issue for resolution by this Court.

4. Finally, unlike several circuit decisions – on both sides of the issue – the decision of the Fourth Circuit does not merely announce a result. It provides an explanation for its position. Moreover, it provides a well-reasoned dissent. Both the majority and dissenting opinions should assist the Court in reaching a careful resolution of the issue. For all of these reasons, certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BRIAN SCHAFFER, a minor,
by his parents and next
friends, Jocelyn Schaeffer
and Martin Schaeffer;
JOCELYN SCHAFFER
and MARTIN SCHAFFER

WILLIAM H. HURD*
SIRAN S. FAULDERS
TROUTMAN SANDERS, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)

**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

November 19, 2004

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JERRY WEAST, Superintendent of Montgomery County Public Schools; BOARD OF EDUCATION OF MONTGOMERY COUNTY, Plaintiffs-Appellants, v. BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin Schaffer; JOCELYN SCHAFFER; MARTIN SCHAFFER, Defendants-Appellees. NATIONAL SCHOOL BOARDS ASSOCIATION; MARYLAND ASSOCIATION OF BOARDS OF EDUCATION; NORTH CAROLINA SCHOOL BOARDS ASSOCIATION; SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION; VIRGINIA SCHOOL BOARDS ASSOCIATION, Amici Curiae Supporting Appellant.

No. 03-1030

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

377 F.3d 449; 2004 U.S. App. LEXIS 15617

January 23, 2004, Argued
July 29, 2004, Decided

COUNSEL: ARGUED: Zvi Greismann, MONTGOMERY COUNTY PUBLIC SCHOOLS, Rockville, Maryland, for Appellants.

Michael Jeffrey Eig, Chevy Chase, Maryland, for Appellees.

ON BRIEF: Haylie M. Iseman, MICHAEL J. EIG & ASSOCIATES, P.C., Chevy Chase, Maryland, for Appellees.

Naomi Gittins, Staff Attorney, NATIONAL SCHOOL BOARDS ASSOCIATION, Alexandria, Virginia; Scott Price, General Counsel, SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION, Columbia, South Carolina; Allison B. Schafer, Director of Policy/Legal Services, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, Raleigh, North Carolina; Stephen C. Bounds, Director of Legal & Policy Services, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, Annapolis, Maryland; Elizabeth Ewing, Director of Legal & Policy Services, VIRGINIA SCHOOL BOARDS ASSOCIATION, Charlottesville, Virginia, for Amici Curiae.

JUDGES: Before WILKINSON, LUTTIG, and MICHAEL, Circuit Judges. Judge Michael wrote the opinion, in which Judge Wilkinson joined. Judge Luttig wrote a separate dissenting opinion.

OPINION BY: MICHAEL

OPINION: MICHAEL, Circuit Judge:

The Individuals with Disabilities Education Act (IDEA) gives every disabled child the right to a "free appropriate public education" tailored to meet his or her unique needs. 20 U.S.C. § 1400(d)(1)(A). To enforce this right, the IDEA requires every public school system receiving federal funds to develop and implement an Individualized Education Program (IEP) for each disabled child in its jurisdiction. *Id.* § 1412(a)(3)-(4). When the parents believe their disabled child's IEP is inadequate, they may initiate an administrative proceeding (called a due process hearing) to challenge the IEP. *Id.* § 1415(f). The parents of Brian Schaffer initiated a due process hearing to challenge the IEP developed for him by Maryland's Montgomery County Public School System (MCPS). The issue in this appeal is whether the district court was correct in assigning the burden of proof to the school system in that proceeding. The IDEA is silent on burden of proof. Because we have no valid reason to depart from the general rule that the party initiating a proceeding has the burden of proof, we reverse and remand.

I.

Brian, who has Attention Deficit Hyperactivity Disorder and other learning disabilities, attended Green Acres private school in Montgomery County from prekindergarten through seventh grade. Green Acres does not have a special education program, and Brian struggled academically throughout his years in attendance there. Brian was placed on probation when he began the seventh grade in the fall of 1997; in October of that year school personnel told Brian's mother that he needed to attend a school that could more adequately accommodate his disabilities.

Shortly thereafter (in November 1997), Brian's mother contacted the Herbert Hoover Middle School, an MCPS school, and requested that Brian be evaluated to determine his eligibility for special education services for the 1998-1999 school year. In the meantime, Brian's parents applied to have him admitted to another private school, the McLean School of Maryland, for the 1998-1999 academic year. On February 26, 1998, the MCPS committee that determines special education eligibility, the Admission, Review, and Dismissal (ARD) Committee, held its first meeting to discuss Brian's educational needs with his parents, their lawyer, and Herbert Hoover school officials. The following month Brian was admitted to the McLean School for the next academic year, and his parents paid the enrollment fee to reserve his place in the eighth grade class. The ARD Committee held its second meeting in early April 1998, found Brian eligible for special education, and offered an IEP for the next (1998-1999) school year.

The proposed IEP specified that Brian would receive 15.3 hours of special education and 45 minutes of speech therapy each week at his "home" school, Herbert Hoover Middle School. After the parents expressed concern about class size at Herbert Hoover, the MCPS offered to provide the same IEP services at the Robert Frost Middle School, a school ten minutes from Brian's home, where he could receive more of his instruction in smaller classes. Shortly thereafter, in May 1998, the parents informed MCPS that the proposed IEP was inadequate and that Brian would attend private school at McLean. At the same time, the parents requested a due process hearing pursuant to the IDEA, claiming that the proposed IEP denied Brian a free appropriate education; they sought reimbursement of the tuition and other expenses for Brian's private school attendance. (The IDEA requires the school system to arrange for an impartial due process hearing, and the hearing cannot be conducted by a system employee or an employee of the state educational agency. *See* 20 U.S.C. § 1414(f)(3). In Maryland the due process hearing is conducted by an administrative law judge (ALJ) in the state's Office of Administrative Hearings. *Md. Code Ann., Educ.* § 8-413(c) (Michie 1997); *A.B. v. Lawson,* 354 F.3d 315, 320 (4th Cir. 2004).)

At the original due process hearing in Brian's case, the ALJ assigned the burden of proof to the parents. The parents challenged the substance of the IEP, not the process by which it was developed, and the ALJ explained that deference is owed to education professionals in the substantive design of an IEP. The parents were therefore required to prove that the IEP was inadequate, specifically, that it

was not "reasonably calculated to enable the child to receive educational benefits." *Hendrick Hudson Bd. of Educ. v. Rowley,* 458 U.S. 176, 207, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). Both sides submitted extensive expert testimony, and the ALJ considered the case to be close. He commented that the "assignment of the burden of proof [was] critical" to the outcome. J.A. 46. Ultimately, the ALJ concluded that the parents had not met their burden. The ALJ's order upheld the IEP proposed by the MCPS and denied the parents' request for reimbursement for Brian's private school expenses.

Brian's parents sued the MCPS (technically, the Board of Education of Montgomery County and its superintendent) in district court, claiming that the ALJ had erred in assigning the burden of proof to them. The district court, agreeing with the parents, reallocated the burden of proof to the MCPS and remanded the case to the ALJ for further proceedings. *Brian S. v. Vance (Schaffer I),* 86 F. Supp. 2d 538 (D. Md. 2000). The MCPS appealed the district court's *Schaffer I* order to our court, but before we heard argument the ALJ reconsidered the case pursuant to the district court's remand order. After reassigning the burden of proof to the MCPS, the ALJ found that the MCPS had failed to prove the adequacy of the IEP. The ALJ ordered the MCPS to make partial reimbursement to the parents for Brian's tuition and expenses at private school for the 1998-1999 year. The MCPS then filed an action (*Schaffer II*) in district court to challenge the ALJ's reassignment of the burden of proof. In the meantime, the MCPS's appeal from the district court's order in *Schaffer I* was still pending in this court. We disposed of that appeal by vacating the district court's order and "remanding to that court with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration of the merits." *Schaffer v. Vance*, 2 Fed. Appx. 232, 233 (4th Cir. 2001) (unpublished). Accordingly, in *Schaffer II* the district court, after reaffirming that the MCPS had the burden of proof, concluded that the ALJ had decided correctly on reconsideration that the proposed IEP was inadequate. The district court then set aside the ALJ's decision on tuition and expenses, awarding full reimbursement to the parents. *Weast v. Schaffer (Schaffer II)*, 240 F. Supp. 2d 396 (D. Md. 2002). The MCPS now appeals the district court's decision in *Schaffer II*.

II.

A.

The IDEA is silent about which side bears the burden of proof in a state administrative proceeding brought by parents to challenge the adequacy of an IEP. When a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief. *See, e.g.*, J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999); *Dalton v. Capital Assoc. Indus. Inc.*, 257 F.3d 409, 416 (4th Cir. 2001); *Newport News Shipbuilding & Dry Dock Co. v. Loxley*, 934 F.2d 511, 516 (4th Cir. 1991). Although "the natural tendency is to place the burden[] on the party desiring change" or seeking relief, other factors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof. *McCormick on Evidence* § 337.

Today our circuit must decide how to allocate the burden of proof in one of these IDEA-prescribed, state administrative proceedings initiated by parents to challenge an IEP. Other circuits are split – and splintered in

reasoning – on this question. Three circuits assign the burden to the parents, and four (perhaps five) assign it to the school system. The Sixth Circuit holds to "the traditional burden of proof" and requires the parents challenging an IEP to establish both its procedural and substantive deficiencies. *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990). The Fifth and Tenth Circuits also assign the burden of proof to the parents, but for a different reason. According to these circuits, because the statute relies on the expertise of education professionals in local school systems, their decisions about the substantive terms of an IEP are owed deference; as a result, the parents bear the burden of proving why an IEP is deficient. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990).

On the other side the Third Circuit assigns the burden of proof to school systems when their IEPs are challenged by parents in administrative proceedings. *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995) (citing *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (holding that when an administrative decision upholding an IEP is challenged *in district court*, the school district has the burden of proof because of its expertise and access to information and witnesses)). Three other circuits, the Second, Eighth, and Ninth, have announced without explanation that the school system has the burden of proving the adequacy of the IEP at the administrative hearing. *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994).

Finally, the D.C. Circuit assigned the burden of proof to a school system when an IEP was challenged as procedurally deficient, noting that "the underlying assumption of the Act is that to the extent its procedural mechanisms are faithfully employed, [disabled] children will be afforded an appropriate education." *McKenzie v. Smith,* 248 U.S. App. D.C. 387, 771 F.2d 1527, 1532 (D.C. Cir. 1985). It is not clear how the D.C. Circuit would assign the burden in a case such as this one where only the substance of the IEP is challenged.

Because the decisions assigning the burden of proof at the administrative hearing to the school system offer little or no analysis, they do not persuade us to depart from the normal rule of allocating the burden to the party seeking relief. We will therefore proceed to consider the main arguments advanced by Brian's parents for assigning the burden to the school system.

B.

The parents argue that because the IDEA is a remedial statute that places the obligation on a school system to provide a free appropriate public education for disabled children, the school system should bear the burden of proving that its IEP meets that obligation. This brings to mind other remedial federal statutes such as *Title VII of the Civil Rights Act of 1964*, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. These statutes impose on employers (or others) the obligation not to discriminate against an individual because of characteristics such as race, sex, disability, or age. Like the IDEA, these statutes are silent about burden of proof, yet we assign it to the plaintiff who seeks the statutory protection or benefit; the burden is not assigned to the party with the statutory obligation. *See, e.g., Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 157 (3d Cir. 1995). We do not believe, then, that a school system should have the burden of proof in an IEP challenge just because it has the statutory obligation to propose an adequate educational program for the disabled child. A "favored group," in other words, is not relieved of the burden of proof "merely because a statute confers substantive rights on [it]." *Clyde K.*, 35 F.3d at 1399.

C.

Because school systems have a natural advantage in IEP disputes by reason of their greater expertise and resources, they should have the burden of proof, according to Brian's parents. Specifically, the argument goes, the school system understands the requirements of the IDEA, has greater educational expertise than parents, and has better access to information and witnesses. *See Oberti*, 995 F.2d at 1219. This persuaded the district court in Brian's case to assign the burden at the administrative level to the school system (the MCPS). *See Schaffer II,* 240 F. Supp. 2d at 403-04 (citing *Lascari v. Bd. of Educ.*, 116 N.J. 30, 560 A.2d 1180, 1186 (N.J. 1989)).

We do not automatically assign the burden of proof to the side with the bigger guns. And "very often [a party] must plead and prove matters as to which his adversary has superior access to the proof." *McCormick on Evidence* § 337. In IDEA administrative disputes Congress has taken steps, short of allocating the burden of proof to school systems, that level the playing field. As the Supreme Court observed, Congress recognized "that in any

[IDEA] disputes the school officials would have a natural advantage," so it therefore "incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).

These procedural safeguards and other provisions in the IDEA are all designed to inform parents and to involve them in the development of the IEP for their child. The Act involves parents at all stages, making them members of their child's IEP team and enabling them to advocate for their position if a dispute arises. 20 U.S.C. § 1414(d). Parents have the right to examine all records, materials, assessments, and other information the school system uses to develop an IEP, and they have the right to participate fully in meetings relating to the IEP and the evaluation of their child. *Id.* § 1415(b). Parents have the right to request an independent evaluation of their child at school system expense. *Id.;* 34 C.F.R. § 300.502(b)(2)(ii). The school system must give parents written notice of their rights at key intervals: when their child is initially referred for evaluation, when they are notified about each IEP meeting, when their child is reevaluated, and when they register any complaint about the school system's effort to provide a free appropriate public education for their child. 20 U.S.C. § 1415(d)(1). The notice of the parents' rights must be written in "an easily understandable manner." *Id.* § 1415(d)(2). Finally, the statute authorizes "parent training and information centers," which, as the name suggests, are centers designed to "meet the training and information needs of parents of children with disabilities" and to "assist parents to understand the availability of, and how to effectively use" the protections of the IDEA. *Id.* § 1482.

If the parents request an administrative hearing, additional services and protections become available. Voluntary mediation conducted by an impartial mediator, with the school system bearing the costs, must be made available before the case proceeds to hearing. 34 C.F.R. § 300.506. The school system must also advise the parents "of any free or low-cost legal and other relevant services available in the area." *Id.* § 300.507(a)(3). There are also discovery requirements that give parents advance notice of the evidence they will encounter at a hearing. A party may not introduce evidence that is not disclosed at least five business days before the hearing. *Id.* § 300.509(a)(3). Likewise, at least five business days prior to the hearing, "each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing." 20 U.S.C. § 1415(f)(2)(A). Finally, if the parents prevail in their challenge, they may be awarded reasonable legal fees. *Id.* § 1415(i)(3)(B).

The IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents. By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects. They have continuing access to information and anticipated evidence once a hearing is requested. In sum, Congress has taken into account the natural advantage a school system might have in the IEP process, including the administrative hearing, by providing the explicit protections we have outlined. As a result, the school system has no unfair information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate the proceeding.

D.

Although Brian's parents recognize that the IDEA is silent as to burden of proof, they argue that "inherent in the [Act] is the principle that school systems bear the burden of proof." Appellees' Br. at 17. The parents refer to two cases, *Mills v. Board of Education of Washington, D. C.*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Association for Retarded Children v. Commonwealth (PARC)*, 343 F. Supp. 279 (E.D. Pa. 1972), that Congress apparently used as the blueprint for the *Education of the Handicapped Act*, now the IDEA. *See Rowley*, 458 U.S. at 194, ("The fact that both *PARC* and *Mills* are discussed at length in the Legislative Reports suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act.").

The Supreme Court in *Rowley* pointed out the similarities between *PARC* and *Mills* and what is now the IDEA. *Rowley*, 458 U.S. at 194 n. 16. *PARC*, like the Act, "required the State to identify, locate, and evaluate [disabled] children, to create for each child an individual educational program, and to hold a hearing on any change in education assignment." *Id.* at 194 n. 16, (internal quotation marks and citations omitted). *Mills*, for its part, provided parents with the various procedural safeguards that appear in the Act, such as their rights to inspect records, to have an independent evaluation of the child, "to object to the IEP and receive a hearing before an independent hearing officer, to be represented by counsel at the hearing, and to have the right to confront and cross-examine adverse witnesses." *Id.* (citation omitted).

Mills placed the burden of proof at the administrative hearing on the school system. 348 F. Supp. at 881. In *PARC* after the school system satisfied its burden of production by introducing its placement report, the burden to introduce evidence shifted to the parents. It appears, however, that the ultimate burden of proof rested with the school system. *PARC*, 343 F. Supp. at 305. The parents argue that because the Act specifically incorporated a number of other major principles from *PARC* and *Mills*, "it stands to reason that Congress intended for the IDEA to echo their assignments of burden of proof." Appellees' Br. at 19. The circumstances compel the opposite conclusion, we believe. Congress took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act. Congress thus knows how to borrow ideas and incorporate them into legislation. For the Act here, it borrowed some ideas and specifically ignored others. We cannot conclude from this that Congress intended to adopt the ideas that it failed to write into the text of the statute. For whatever reason Congress did not assign the burden of proof, and Congress has not signaled by its silence that we should depart from the general rule.

E.

The dissent argues that in light of the affirmative (IDEA-mandated) obligation a school system has to provide an appropriate educational program for each disabled child, "the most reasonable, though by no means irrebuttable presumption, is that the school [system] should bear the burden of proof in the due process hearings." *Post* at

14. As we have already pointed out, however, the general rule is quite the opposite: a party who initiates a proceeding to obtain relief based on a statutory obligation bears the burden of proof. *McCormick on Evidence* § 337. The general rule is sometimes stated in a slightly different way that is instructive here: the burden of proof is on the party who should lose if no evidence is offered by either side. 9 J. Wigmore, *Wigmore on Evidence* § 2485 (1981). We believe that when parents challenge the adequacy of an IEP, they should lose if no evidence is presented. To say that the school system should lose is to say that every challenged IEP is presumptively inadequate. *See id.* A presumption of inadequacy would go against a basic policy of the IDEA, which is to rely upon the professional expertise of local educators. Congress enacted the IDEA with the clear intention of deferring to local school authorities for the development of educational plans for disabled children. *See Rowley,* 458 U.S. at 207-08; *Hartmann by Hartmann v. Loudoun County Bd. of Educ.,* 118 F.3d 996, 1000-01 (4th Cir. 1997). And while Congress "entrusts a [disabled] child's education to state and local agencies" under the IDEA, it "protects individual children by providing for parental involvement [and for certain assistance to parents] . . . in the formulation of [a] child's [IEP]." *Rowley,* 458 U.S. at 208. Under this statutory arrangement, it is reasonable to require parents attacking the terms of an IEP to bear the burden of showing why it is deficient.

The dissent would assign the burden of proof to the school system because of its "distinct, inherent advantage" over parents when it comes to proposing and evaluating educational plans for disabled children. *Post* at 14. Parents, the dissent says, "lack the comprehensive understanding . . . [and] means to assess the likely benefit of available alternatives." *Id.* Again, when Congress designed and passed the IDEA, it was keenly aware that school systems have professional expertise and that parents do not. It was for this very reason that Congress imposed statutory safeguards to assist parents in becoming substantively informed. If Congress considered burden of proof at all, it no doubt recognized that allocating the burden to school systems is not the kind of help parents really need in challenging IEPs. For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate. Shifting the burden of proof, in other words, will not enable parents by themselves to mount a serious, substantive challenge to an IEP. Congress recognized that parents need professional assistance, and the IDEA therefore allows parents who prevail in due process hearings to recover their fees for hiring lawyers. 20 U.S.C. § 1415(i)(3). If experience shows that parents do not have sufficient access to substantive expertise under the current statutory scheme, Congress should be called upon to take further remedial steps. As far as procedure is concerned, however, we have no convincing reason to depart from the traditional burden of proof in IDEA due process hearings.

III.

In sum, the IDEA does not allocate the burden of proof, and we see no reason to depart from the general rule that a party initiating a proceeding bears that burden. Congress was aware that school systems might have an advantage in administrative proceedings brought by parents to challenge IEPs. To avoid this problem, Congress provided a number of procedural safeguards for parents, but assignment of the burden of proof to school systems was not one of them. Because Congress took care in specifying specific procedural protections necessary to implement the policy goals of the Act, we decline to go further, at least insofar as the burden of proof is concerned. Accordingly, we hold that parents who challenge an IEP have the burden of proof in the administrative hearing. We reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

DISSENT BY: LUTTIG

DISSENT BY: LUTTIG, Circuit Judge, dissenting:

I do not agree with the majority's holding that the burden of proof in due process hearings conducted pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(f)-(g), should be borne by a disabled child's parents, rather than by the school district that is charged with providing that child a "free appropriate public education," 20 U.S.C. § 1412(a)(1)(A). Not only does the school district have the affirmative, statutory obligation under the IDEA to develop a suitable education program (IEP) for every disabled child, the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student's parents are in to show that the school district has failed to do so. Accordingly, I would hold that the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources.

The majority concludes otherwise based on the "normal rule of allocating the burden to the party seeking relief." *Ante* at 6-7. As even it admits, however, this so-called "rule" is, in actuality, merely a presumption and not a very strong one at that. Relying on *McCormick on Evidence,* the majority explains that, "although 'the natural tendency is to place the burden[] on the party desiring change' or seeking relief, other factors such as policy considerations, convenience, and fairness may allow for different allocation of the burden of proof." *Ante* at 5 (quoting *McCormick on Evidence* § 337).

Each of these "other factors" – policy, convenience and fairness – weigh against the assignment of the burden of proof to the parents in this case. To begin with, the policies behind the IDEA indisputably argue in favor of placing the burden of proof with the school district. As the Supreme Court has explained,

> the Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"

Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 179, 73 L. Ed. 2d 690 102 S. Ct. 3034 (1982) (brackets in original). In the service of this effort, the IDEA obligates school districts to provide every disabled child with an educational program that is reasonably responsive to that child's disability. *Id.* at 188-89. The IDEA also requires school districts to involve the parents of the disabled child in the formulation of educational plans made in response to the child's particular disability and to receive and consider the suggestions of parents in the development of those plans. In light of these affirmative obligations, the most reasonable, though by no means irrebuttable, presumption is that the school district should bear the burden of proof in the due process hearings required by the Act as well.

The majority suggests otherwise by comparing the obligation of school districts under the IDEA to that of defendants in civil rights claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination Act. *See ante* at 7. Because defendants in civil rights claims have a statutory obligation to refrain from discrimination but do not bear the burden of proof in claims against them, the majority reasons that the school districts' obligation under IDEA should not compel it to bear the burden of proof either. *Ante* at 7. The analogy is not apt. Unlike the civil rights statutes referenced by the majority, the IDEA does not merely seek to *remedy* discrimination against disabled students, it imposes an *affirmative obligation* on the nation's school systems to provide disabled students with an enhanced level of attention and services. *See Rowley,* 458 U.S. at 189 (explaining that "the face of the statute evinces a congressional intent . . . to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each [disabled] child") (emphasis in original). And it is this affirmative obligation (rather than the Act's purpose of remedying discrimination) that weighs most heavily in favor of placing the burden of proof in due process hearings on the school district.

Turning next to the interests of convenience and fairness, it is apparent that the school district possesses a distinct, inherent advantage over the parents of disabled children in assessing the feasibility and the likely benefit of alternative educational arrangements. While individual parents may have insight into the educational development of their own children, they lack the comprehensive understanding of the educational alternatives available to disabled children in the school district that officials of the school system possess. And, even more importantly, the parents lack the means to assess the likely benefit of available alternatives. Parents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children.

The majority recites, at length, the services and protections provided to parents under the IDEA, but the mere recitation of these provisions does nothing more than highlight Congress' awareness that parents of disabled children operate at a disadvantage when they seek to contest the individualized educational placement developed by their school district. It certainly does not show that Congress has "leveled the playing field" between the school district and the parents. These procedural protections may invest parents with a basis to understand the characteristics of their child's disability and may even provide some understanding of the relative benefits and drawbacks of the educational plan proposed by the school district. But, even in the rosiest of scenarios, the provision of such remedial protections and services would not begin to impart to the average parent the level of expertise or knowledge that the school district possesses as a matter of course.

The majority may well be correct that the assignment of the burden of proof to the party with the "bigger guns" is not "automatic." However, with only a faint, general presumption in favor of placing the burden of proof on the complainant on the other side of the equation, the fact that the party with the "bigger guns" also has better access to information, greater expertise, and an affirmative obligation to provide the contested services can hardly be ignored. Indeed, in my judgment, the collective weight of each of these considerations is dispositive.

I fear that, in reaching the contrary conclusion, the majority has been unduly influenced by the fact that the parents of the disabled student *in this case* have proven to be knowledgeable about the educational resources available to their son and sophisticated (if yet unsuccessful) in their pursuit of these resources. If so, it is regrettable. These parents are not typical, and any choice regarding the burden of proof should not be made in the belief that they are. For the vast majority of parents whose children require the benefits and protections provided in the IDEA, the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering. By the same token, most of these parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children. With the full mix of parents in mind, I believe that the proper course is to assign the burden of proof in due process hearings to the school district.

I respectfully dissent.

JERRY D. WEAST,[1] et al. Plaintiffs v.
BRIAN SCHAFFER, et al. Defendants

Case No. PJM 99-15, (Docket # 61)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

240 F. Supp. 2d 396; 2002 U.S. Dist. LEXIS 25323

November 21, 2002, Decided
November 25, 2002, Opinion Filed

COUNSEL: For Plaintiff(s): Zvi Greismann, Esquire, Rockville, Maryland.

For Plaintiff(s): Jeffrey A. Krew, Esquire, Columbia, Maryland.

For Defendant(s): Michael J. Eig, Esquire, Haylie Michelle Iseman, Esquire, Chevy, Chase, Maryland.

JUDGES: PETER J. MESSITTE, UNITED STATES DISTRICT JUDGE.

OPINION BY: PETER J. MESSITTE

OPINION:

I.

The parents of Brian Schaffer, a child with a disability as defined in the Individuals With Disabilities Education Act (IDEA), 20 U.S. § 1400, *et seq.*, disagreed with the Montgomery County, Maryland, Public School system (MCPS) that it offered Brian a Free Appropriate Public

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[1] Plaintiff Weast is the Superintendent of the Montgomery County, Maryland Public School System (MCPS). Plaintiffs will be referred to collectively hereinafter as "MCPS."

Education (FAPE) for the school year 1998-99. As a result, the parents unilaterally placed Brian in private school for that year and sought reimbursement pursuant to the Act. With the case before him for a second time, the Administrative Law Judge (ALJ) held that MCPS had not provided Brian a FAPE,[2] but awarded the parents reimbursement

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[2] The first time this case was before him (*Schaffer I*), the ALJ denied the parents reimbursement. Finding that assignment of the burden of proof in the case was "critical" to his decision and assigning that burden to the parents, he concluded that they had failed to demonstrate that the Individualized Educational Plan (IEP) devised for Brian was not reasonably calculated to provide educational benefit or that the placement offered by MCPS was not appropriate to provide for the child's education in accordance with the IDEA.

Brian's parents appealed the decision to this Court, which granted their motion for summary judgment and issued an opinion reallocating the burden of proof to MCPS. *See Brian S. v. Vance,* 86 F. Supp. 2d 538 (D. Md. 2000). Based on that reallocation of the burden of proof, the case was remanded to the ALJ for further proceedings. Notwithstanding the apparent interlocutory nature of the Court's decision, MCPS took an appeal to the Fourth Circuit. While that appeal was pending, the ALJ considered the case anew and applied this Court's revised burden of proof scheme. Revisiting his earlier decision, the ALJ reversed himself and concluded that the proposed IEP would not have provided Brian with a FAPE for 1998-99. However, the ALJ also concluded that, while Brian's parents were entitled to reimbursement for the private placement, since they never seriously contemplated placing him in public school, they should receive only no more than one-half of the tuition paid for Brian's private education for the indicated school year.

The Fourth Circuit, viewing the case in that posture, ruled:

> In light of this development, we vacate the decision of the district court and remand to that court with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits. At this stage, it remains unclear what role, if any, the allocation of the burden of proof will have on the final adjudication of Brian's claim. Moreover, there may well be cross-appeals of the ALJ's decision since neither party prevailed fully at the hearing stage. If this court is to address the issue of who has

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for only one-half the year's tuition (*Schaffer II*). The parents have appealed the latter decision. They also ask, by way of a motion for preliminary injunction, that MCPS be required to fund Brian's placement at private school for the school years 1999-00 and 2000-01. MCPS has appealed the decision of the ALJ to the extent that he awarded the parents any reimbursement at all.

The parties have filed Cross-Motions for Summary Judgment.[3]

The Court will GRANT the parents' Motion for Summary Judgment and will AFFIRM the finding of the ALJ that MCPS did not provide Brian with a FAPE for 1998-99.

> the burden of proof in challenging an initial IEP, it should be in the context of a matured case or controversy rather than in the piecemeal fashion in which this case now appears before us. Accordingly, the judgment of the district court is vacated and remanded for further proceedings consistent with this opinion.

Schaffer v. Vance, 2 Fed. Appx. 232 (4th Cir.2001) 2001 WL 22920.

The ALJ has now rendered his decision on remand (*Schaffer II*) and the parties have cross-appealed that decision. As the Court will discuss presently, the issue of which side bears the burden of proof was once again critical to the ALJ's decision.

[3] Summary judgment is appropriate where there is no genuine issue of material fact. Fed. R. Civ. P. 56. The parties apparently agree that such is the case here, the only issue being what conclusions should be drawn from undisputed facts. On the other hand, the Court is also the trier of fact in an appeal from an administrative decision in an IDEA case. Accordingly, the Court can also (and indeed will) judge this appeal as the trier of fact, especially where – as here – the parties have added no evidence to the record beyond what the ALJ had before him. *Cf. Marathon Mfg. Co. v. Enerlite Prod. Corp.,* 767 F.2d 214, 217 (5th Cir. 1985) (holding that where the parties stipulate that the court may make findings of fact on the basis of the record at the summary judgment hearing, the court may determine the facts rather than merely whether factual issues exist).

It will REVERSE the ALJ's decision insofar as he ordered reimbursement for only one-half of the school year and will DIRECT that the parents be reimbursed for the entire 1998-99 school year. The parents' Motion for Preliminary Injunction, asking that they be reimbursed for the school years 1999-00 and 2000-01, will be DENIED.

The Cross-Motion of MCPS for Summary Judgment will be DENIED.

II.

A) *Schaffer I*

Brian, who was 14 years old in 1998-99, is learning-disabled, language-impaired and other health impaired. He has been diagnosed as having attention deficit hyperactivity disorder and needs special education and related services to benefit from school attendance. From kindergarten through seventh grade, he attended Green Acres School, a private school in Montgomery County where, despite small class size and significant accommodations as well as parentally provided extra services, he did not succeed.

In November 1997, Brian's mother contacted MCPS and requested special education services for him for the 1998-99 school year, submitting outside evaluations in support of her request. After reviewing the outside evaluations and conducting additional tests, MCPS found Brian eligible for special education and proposed a part-time placement at Hoover Middle School, with an alternative placement at the Robert Frost Middle School. This was Brian's initial IEP.

Because they believed the IEP drafted for Brian was not reasonably calculated to provide him with appropriate educational benefit, his parents notified MCPS that they rejected the proposed placement. In May of 1998, they requested an administrative due process hearing. More or less simultaneously, anticipating the beginning of a new school year in the fall, they enrolled him for the 1998-99 school year at the McLean School, a private school for learning and language-disabled students located in Montgomery County.

In *Schaffer I,* in which the ALJ assigned the burden of proof to the parents, the ALJ considered the evidence relative to the "central auditory processing problem" he found Brian had. He cited the testimony of Drs. Ruth D. Spodak and Carol A. Kamara, Brian's experts on learning disabilities and speech/language pathology respectively, both of whom stated that the IEP proposed for Brian failed to offer an appropriate educational benefit because he required small, self-contained special education classes of a kind not included in the IEP. Dr. Spodak testified that such classes were essential to Brian's education because they would tend to minimize the distractions interfering with his ability to learn. Dr. Kamara testified that his "central auditory processing" problem increased his susceptibility to distractions, necessitating a small, self-contained learning environment.

The ALJ noted that Dr. Spodak's testimony differed in some respects from a report she and members of her staff had written earlier about Brian's learning disabilities. This, along with the fact that she herself had spent only ten minutes with Brian, caused the ALJ to "question[] the probative value of Dr. Spodak's opinion." Similarly, the ALJ noted that Dr. Kamara's opinion was compromised to some extent by her acknowledgment of the diagnostic limitations of the test she relied upon in diagnosing Brian's "central auditory processing" problem and by her refusal to offer an opinion as to whether Brian's speech-language disability was mild, moderate, or severe. Finally, the ALJ noted that two experts from MCPS, Dr. Barbara J. Butera, a school psychologist, and Pamala Zahara, a speech pathologist, testified that the IEP was appropriate to Brian's needs and that, in their view, Brian suffered not from a "central auditory processing" problem but from a mild speech-language disability.

The ALJ deemed assignment of the burden of proof in the case to be "critical":

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

Placing the burden of proof upon the parents, the ALJ decided that they had not demonstrated that Brian failed to receive a FAPE:

> The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

Accordingly, the parents' request for reimbursement was denied.

B) *Schaffer II*

In *Schaffer II,* with the burden of proof shifted to MCPS, but without additional evidence being presented, the ALJ revisited the record. Again he found that the core dispute was whether Brian had a "central auditory processing" problem and again he considered the impact, if any, that that disability had on Brian's ability to learn. The ALJ reviewed the testimony of Dr. Kamara, the Schaffers' speech/language pathology and audiology expert, who was critical of the proposed placement of Brian at Herbert Hoover Middle School or the Robert Frost Middle School "because of the risk of simultaneous messages, distractions and possible distortions of audio signals in that setting." He looked again at Dr. Kamara's opinion that the critical need of the child – his "central auditory processing" problem – had not been addressed in the 1998-99 IEP. The ALJ also considered the testimony of the speech/language pathologist for MCPS, Pamala Zahara, who opined that Brian did not exhibit evidence of "severe auditory processing difficulties related to discrimination at the word level." The ALJ weighed Dr. Kamara's qualifications as a certified audiologist against those of Ms. Zahara as a speech/language pathologist. The fact that Dr. Kamara had conducted a formal comprehensive evaluation of Brian that took four hours to complete as opposed to the informal assessment Ms. Zahara took approximately one hour to make was also taken into account. At the end of the day, the ALJ concluded that "undoubtedly, Dr. Kamara's effort and experience in evaluating the Child was more extensive than that of Pamala Zahara."

Even then, however, the ALJ found that the evidence remained in balance:

> In sum, the weight of the evidence from Dr. Kamara and Pamala Zahara on the usefulness of the SCAN-A and the existence of the Child's unique "central auditory processing" problem, rests in equipose. In resolving the dispute of fact, the ALJ must accept one expert's opinion and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinion from Dr. Kamara that the Child has an unique "central auditory processing" problem and rejects Pamala Zahara's opinion to the contrary. Having reversed the factual finding on that initial point, the ALJ will further accept, the opinion of Dr. Kamara that the Child's unique "central auditory processing" problem has a significant impact on his learning and rejects expert opinion testimony from MCPS to the contrary.

The ALJ also revisited the testimony of Dr. Spodak, Brian's expert witness in psychology and learning disabilities:

> During her testimony, she opined, consistent with the opinion of Dr. Kamara, that the Child would receive only trivial or minimal educational benefit, not the appropriate benefit, in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting.[4] Dr. Spodak believes that the Child's educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes in all academic settings are needed to minimize distractions in order for the Child to be available for learning.

The ALJ gave the MCPS experts their due, but found their opinions wanting:

> MCPS special education experts testified that many of the disabled students in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School have a "profile" similar to the Child's abilities, disabilities and educational needs. MCPS special education experts testified those students with a "similar profile" are successful learning in that setting. This testimony estimates the Child's projected learning in the "inclusion model" setting compared with a group of students with whom the experts are familiar on the basis that the Child has a "similar profile." This may be a valid comparison if the Child's needs are correctly identified and properly considered in such "profiling."
>
> However, MCPS experts do not recognize that the Child has an unique central auditory processing problem that has a significant impact on his learning as described by Dr. Kamara. Resultantly, the ALJ is left to question how similar a profile the Child has to those students who are successful at the Herbert Hoover Middle School or the Robert Frost Middle School. The failure of

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[4] Under the "inclusion model" at Herbert Hoover, Brian would have been in a class of between 24-28 students. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The certified special education teacher would focus on and provide special education services to 5-6 students in the class who had IEPs. Brian would have been one of those 5-6 students.

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> MCPS experts to accept and take this need of the Child into their consideration is a factor in evaluating the merit of their opinions.
>
> Dr. Kamara testified that the April 6, 1998 IEP, as drafted, does not recognize the Child's central auditory processing problem as a need to be addressed in the Child's education. The April 6, 1998 IEP had no goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem, as found and described by Dr. Kamara. This testimony was not refuted. Having accepted the position that the Child has an unique central auditory processing deficit, the failure of the IEP to recognize and address that deficit is noteworthy.

And, finally, the ALJ reaffirmed the essential equivalence of the evidence:

> In sum, the weight of the evidence from the Parents' experts and the experts on behalf of MCPS on the degree of "educational benefit" that the Child could have obtained under the April 6, 1998 IEP, in the "inclusion" setting at either the Herbert Hoover Middle School or the Robert Frost Middle School, rests in equipose [sic]. In resolving this dispute, the ALJ must accept the opinion from one side's experts and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinions from Dr. Kamara and Dr. Spodak that the Child – given his potential for learning – would not have obtained meaningful educational benefit under the April 6, 1998 IEP in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School.

> Given the findings of fact, herein, MCPS has failed to persuade the ALJ that the April 6, 1998 IEP was reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were appropriate to provide for the Child's educational needs in accordance with the IDEA.

Notwithstanding this conclusion, full reimbursement for Brian's private schooling for school year 1998-99, was denied. Noting that reimbursement is an equitable form of relief, the ALJ concluded on the basis of the evidence that there was "a design by the parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend private school . . . The parents did not approach their interaction with MCPS as a partnership in educating the child as a student with disabilities." Accordingly, "as a matter of equity," the ALJ decided to create a "partnership between the parents and MCPS for funding the placement of the Child at the McLean School of Maryland for the 1998-1999 school year." In other words, he directed the school authorities to pay one-half the tuition's costs for the year, the parents would be obliged to assume the other half.

III.

Interestingly, in its appeal from the ALJ's decision in *Schaffer II,* MCPS does not challenge the Court's earlier decision to allocate the burden of proof to MCPS. Instead it argues that the ALJ misapplied that burden of proof by materially altering his findings of fact and by making new findings as to the credibility of witnesses where no new evidence was introduced and where the original evidence in favor of MCPS remained "overwhelming." However, despite the failure of MCPS to raise the issue, since the Fourth Circuit vacated the Court's earlier decision regarding the allocation of burden of proof and since the allocation of the burden was as critical to the disposition of *Schaffer II* as it was to *Schaffer I,* the Court must necessarily address the issue again. Only then can the Court determine whether or not the ALJ misapplied that burden, as argued by MCPS.

Brian's parents, while denying that they "predetermined" that Brian would attend private school come what may, insist that their intention is in any event irrelevant. So long, they say, as they cooperated in good faith in the development of an IEP, they are entitled to full reimbursement if Brian was not offered a FAPE, even if they were fixed on private schooling for him all along.

IV.

The Court accepts the ALJ's conclusion in *Schaffer II* that allocation of the burden of proof is critical to the adjudication of Brian's claim. Accordingly the Court reaffirms its earlier decision that, with regard to an initial IEP, the burden of proof in the administrative due process hearing that might follow is upon the school district, not upon the parents. The Court embraces the same analysis as before. Thus –

A challenge to an IEP may arise in different settings:

1) The first involves an initial IEP, proposed by the school authorities the first time it is sought for a child, one which the parents disagree with and as to which they seek a administrative due process hearing (the present case);

2) Next is the existing IEP, which at one time was agreed to by everyone, but which either the parents or the school district seeks to change against the wishes of the other, whereupon the matter goes to a due process hearing; and

3) Finally, there is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.[5]

The cases, when considering which side has the burden of proof, do not always distinguish among these settings, but in fact there appears to be reason to do so.

In the last scenario, the law and policy considerations are the most sharply defined. The Fourth Circuit has clearly held that the burden of proof on appeal from an administrative decision is upon the party challenging the decision. *See Barnett v. Fairfax County Sch. Bd.,* 927 F.2d 146, 152 (4th Cir. 1991); *Tice v. Botetourt County Sch. Bd.,* 908 F.2d 1200, 1206 n.5 (4th Cir. 1990); *Spielberg v. Henrico County Pub. Sch.,* 853 F.2d 256, 258 n.2 (4th Cir. 1988). This, according to the Fourth Circuit, arises out of deference to the underlying state administrative process. *Tice,* 908 F.2d at 1206 n.5. That in turn undoubtedly flows from the general belief that, once an impartial judicial hearing has been held and a decision made – even at the administrative level – the burden of overturning the decision ought to be upon the party challenging it.[6]

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[5] There is at least one further scenario, in which both the parents and the school district seek to change an existing plan. Discussion of which party has the burden of proof in that setting is best left for another day.

Moving to the intermediate scenario, where an existing IEP is sought to be changed, if for no other reason than that it seems "fair[]," *Tatro v. Texas,* 703 F.2d 823, 830 (5th Cir. 1983), it is not unreasonable to conclude that the burden of persuasion as to the change should be borne by the party seeking the change. Numerous cases so hold. *See, e.g., Salley v. St. Tammany Parish Sch. Bd.,* 57 F.3d 458, 467 (5th Cir. 1995); *Doe v. Bd. of Educ.,* 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Indep. Sch. Dist. No. 4,* 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Ind. Sch. Dist. v. State Bd. of Educ.,* 790 F.2d 1153, 1158 (5th Cir. 1986); *Doe v. Brookline Sch. Comm.,* 722 F.2d 910, 919 (1st Cir. 1983); *Tatro,* 703 F.2d at 830.[7]

These authorities are in accord with the observation made by Professor Wigmore that the burden of proof is frequently placed "upon the party to whose case the fact is essential," 9 Wigmore on Evidence, § 2486 at 288 (italics

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[6] But not all circuits agree that assignment of the burden should be thus. In *Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 533 (3d Cir. 1995), for instance, the Third Circuit held that the burden should always be upon the school district. *See also Oberti v. Bd. of Educ.,* 995 F.2d 1204, 1219 (3d Cir. 1993).

[7] It is not always clear from the language of these cases whether they are addressing the burden of proof at the administrative level, in the district court, or both. The cases are often cited, however, as standing for the proposition that the party seeking to change an existing IEP bears the burden of proof at the administrative level. *See, e.g., T.H. v. Bd. of Educ.,* 55 F. Supp. 2d 830, 835 n.5 (N.D. Ill. 1999); *Schmerling v. Anne Arundel County Bd. of Educ.,* Civ. No. WMN 98-2283 slip op. at 5 (D. Md. May 19, 1999); *Manchester Sch. Dist. v. Charles M.F.,* 1994 U.S. Dist. LEXIS 12919 No. CIV. 92-609-M, 1994 WL 485754, at *4 (D. N.H. Aug. 31, 1994).

omitted). In the context of an IDEA case, this argues for the proposition that the party seeking a change in the IEP should have to explain why the change is appropriate.

Despite this, a number of cases have held that the burden of proof at the administrative level should always lie with the school district, even when the parents are seeking to change an existing IEP. *See Clyde K. v. Puyallup Sch. Dist., No. 3,* 35 F.3d 1396, 1398 (9th Cir. 1994); *see also Walczak v. Fla. Union Free Sch. Dist.,* 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Indep. Sch. Dist., No. 196,* 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. v. Scott P.,* 62 F.3d 520, 533 (3d Cir. 1995); *Fuhrmann v. East Hanover Bd. of Educ.,* 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Lascari v. Bd. of Educ.,* 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The reasoning of these holdings varies from none at all, i.e. from mere assertion, to a brief reference to the statutory obligation to accommodate disabled children, to, in a very few cases, a rather elaborate explanation. Among the cases that merely assert that the burden is upon the school district are *Clyde K.,* 35 F.3d at 1398, and *Walczak,* 142 F.3d at 122. In the middle category is *Wall v. Mattituck-Cutchogue Sch. Dist.,* 945 F. Supp. 501 (E.D.N.Y. 1996), to wit:

> It has consistently been held that the burden throughout the administrative process is placed upon the school district. This is in obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities. *See* S. Rep. No. 94-168 to P.L. 94-142, at 9, reprinted in 1975 U.S.C.C.A.N. 1425, 1433 ("It is this Committee's belief that the Congress must take a more active role under its

> responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity.").

945 F. Supp. at 511 (citations omitted).

Undoubtedly the most elaborate rationale was set forth in *Lascari*, which bears quoting in extenso:

> We believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change.
>
> Various considerations lead us to that conclusion. Underlying the State and federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. Finally, the regulatory scheme vests handicapped children and their parents with numerous procedural safeguards. Those safeguards include the right to counsel and to the advice of experts, 20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.508(a)(1); to present evidence and cross-examine witnesses, 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.508(a)(2); to "have the child who is the subject of the hearing present," id. at § 300.508(b)(1); and to a public hearing, id. at § 300.508(b)(2). Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.

> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. In the past, we have placed either the burden of production, see *Ryan v. Mayor & Council of Demarest*, 64 N.J. 593, 604-05, 319 A.2d 442 (1966), or the burden of proof on the party with the better access to relevant information, *Andersen v. Exxon Co.*, 89 N.J. 483, 500, 446 A.2d 486 (1982); *Brundage v. New Jersey Zinc Co.*, 48 N.J. 450, 475-77, 226 A.2d 585 (1967). The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. *Cf. S-1 v. Turlington*, 635 F.2d 342, 348-49 (5th Cir.) (burden on district to raise question whether student's misconduct is based on handicap because parents lack wherewithal to know rights under EAHCA), cert. denied, 454 U.S. 1030, 102 S. Ct. 566, 70 L. Ed. 2d 473 (1981), abrogated on other grounds by *Honig v. Doe*, 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

116 N.J. at 44-45; 560 A.2d at 1188.[8]

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[8] This Court would add a further observation: The Congressional statements and declarations that appear at the beginning of the IDEA refer to minority children, *see, e.g.* 20 U.S.C. § 1400(c)(7) to (10), in particular economically disadvantaged minorities. *Id.* at § 1400(b)(8)(C).

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As to the first scenario – that in which an initial IEP is disputed at a due process hearing – all of *Lascari's* considerations came into play but there is more. In the initial situation, unlike the change situation, the parents have never agreed that the IEP is appropriate. By definition, they have disagreed and sought a determination by an impartial hearing officer, one, it may be noted, who by law may not be associated with the school authority. 20 U.S.C. § 1415(f)(3). In this circumstance, the only sense in which "change" is involved is that the parents wish to change what the school authorities have unilaterally proposed. Since the IEP is supposed to be a joint enterprise, if parents have never agreed to it, it is debatable whether an IEP can even be said to exist. The situation seems much like that in which two parties engage in a dispute, following which litigation is initiated. If one assumes, following Wigmore, that "the party having in form the affirmative allegation" should carry the burden of proof, 9 Wigmore on Evidence, § 2486 at 288 (italics omitted), it would seem entirely reasonable to assign the burden to the school authority to affirmatively establish the propriety of the plan it proposes.[9]

Strictly speaking, if parents in those categories have the burden of persuasion at the administrative level, their failure to put on a prima facie case would mean that the school district could rest without having to produce any evidence in justification of the IEP. On the other hand, parents who can afford to retain counsel and experts, while still having the burden of persuasion, could at least force the school district to produce evidence in support of the IEP. Query, whether such a result is fair, apart from whether Congress could have intended it.

[9] Of course the same argument could be made in support of assigning the burden to the school board at any level – that it should always be required to demonstrate the propriety of the plan that it

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As one commentator has pointed out, allocating the burden of proof to the school authority in no way reflects a lack of deference to the expertise of the school authorities. But there may be, she writes, a tendency to "confuse the *Rowley* Court's deference to school officials on methodological matters with matters of burden of proof." Dixie Snow Huefner, Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?, 14 Harv. J.L. & Pub. Pol'y 483, 512 (1991). To acknowledge the expertise of school officials is not the same as saying that they should not have to demonstrate to an impartial fact-finder, at least in connection with an initial IEP, that the proposed goals and objectives of the IEP address the student's needs, that the proposed IEP will deliver services to those needs in a way that will provide progress towards those goals and objectives, or that criteria are in place to evaluate the child's progress which can actually measure the extent to which the objectives are obtained. *Id.*

Finally, Wigmore offers this perspective on the burden of proof issue:

> There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific

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proposes. That, in fact, appears to be the rationale of those cases that have assigned the burden to the school board at all levels.

> classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

9 Wigmore on Evidence, § 2487 at 292 (footnotes omitted).[10]

To the extent that the Court writes on a clean slate, therefore, it holds that with regard to an initial IEP, experience and fairness dictate that the school district should have the burden of proof at any administrative due process hearing that might follow. In contrast, not only experience and fairness but clear case law indicate that, when a change is sought in an existing IEP, the party seeking the change should have the burden of proof.

Because the case at bar involved the parents' disagreement with a proposed initial IEP, the Court finds the ALJ correctly assigned the burden of proof to MCPS.

V.

As MCPS points out, "federal courts must accord due weight to state administrative proceedings which are entitled to be considered *prima facie* correct." *See Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). But what MCPS asks is that the Court defer to the ALJ's findings in *Schaffer I* as opposed to *Schaffer II*.

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[10] Accord Edmund M. Morgan, Basic Problems of Evidence 28 (4th ed. 1963):

> The truth seems to be, and many of the modern decisions expressly state, that the allocation of the burden is to be determined by considerations of fairness, convenience and policy. Such considerations require the exercise of a sound judgment and prior judicial experience, as revealed in past decisions, has strong persuasive effect.

Brian's parents argue, not without reason, that the ALJ's findings in *Schaffer I* are no longer entitled to a presumption of correctness, especially insofar as they were made based upon a misallocated burden of proof. The Court agrees with the parents. Unquestionably the operative administrative decision before the Court is that of *Schaffer II*. If *Schaffer I* has any continuing relevance, it is only be [sic] insofar as it may lead the Court not to follow findings in *Schaffer II* because the former seriously undermine the latter.

The Court, however, giving due weight to the ALJ's findings in *Schaffer II*, which is to say acknowledging their *prima facie* correctness, chooses to follow those findings. Whatever reservations the ALJ may have had in *Schaffer I* regarding certain aspects of testimony of Brian's experts, the essential and unvarying point of both *Schaffer I* and *Schaffer II* is that the evidence was in equipoise. That clearly means that, with the shifting of the burden of proof to MCPS, a conclusion favorable to Brian's parents relative to the FAPE question must follow. The Court is not persuaded by the dramatic suggestion of MCPS that the ALJ has "materially altered" the facts. Since the facts have always been, in the ALJ's judgment, in balance, the case could have been decided either way. The ALJ has now opted in favor of Brian and his parents instead of MCPS and the Court is satisfied with that conclusion. The Court concludes that MCPS did not provide Brian with a FAPE for the school year 1998-99.

That aspect of the ALJ's decision will be AFFIRMED.

VI.

The Court takes a different view with regard to the ALJ's decision to reimburse the parents for only one-half of Brian's tuition for the 1998-99 school year.

The ALJ recognized that parents are entitled to be reimbursed by the public education agency for a private placement when the public agency has not provided their child with a FAPE. *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985). But because he determined that reimbursement is "equitable in nature," *Id.* at 374, and because he found that the parents were always committed to sending Brian to private school come what may, the ALJ concluded that their reimbursement should be limited. MCPS cites authority to the effect that in circumstances such as these – where parents intend to reject any public school placement regardless of the school's recommendation – no reimbursement should be awarded at all. *See, e.g., Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503, n.25 (6th Cir. 1998) ("Under IDEA, if the Tuckers unilaterally decided to place Barkley in LCDC, the local school district was not required to pay for that private school education, even though Barkley had a recognized disability and had been receiving special education services from the local school district."). The Court disagrees with both the ALJ and MCPS.

The Court accepts that Brian's parents were intent on finding a private school for him even as they sought to have him identified as a student with disabilities under IDEA. It is undisputed that they paid a non-refundable enrollment fee to the McLean School knowing that the Admission, Review and Dismissal (ARD) meeting that was

going to review Brian's IEP for the 1998-99 school year had not yet taken place.

Nevertheless, on April 6, 1998, the parents attended the ARD committee meeting and indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered and thereafter recontact MCPS. From all that appears the parents substantially followed through. They arranged for private consultants to review the IEP, submitted those reviews to MCPS, and Brian's mother visited the Robert Frost Middle School where she met with one of the school's special education teachers.[11] The Court further accepts that the mother told the special education teacher at Frost that she was sure that Frost would not be appropriate for Brian. Finally, the Court accepts the ALJ's finding that the parents did not thereafter recontact MCPS or request any additional services or goals to be added to the child's IEP for the 1998-99 school year.[12] Other than this, there is no suggestion that the

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[11] Although the parents failed to visit the Herbert Hoover Middle School, the record does not indicate whether this was the result of a decision of the parents not to cooperate with MCPS, whether the visit was canceled by MCPS, or whether it was canceled by mutual agreement.

[12] However, the ALJ suggested that MCPS bore some responsibility for this state of affairs:

> The conduct of MCPS experts also leaves much to be desired. MCPS experts failed to develop an IEP that was reasonably calculated to provide the Child with "significant learning" and "meaning educational benefit." The Parents' experts had evaluated the Child and provided reports of those evaluations. Those reports were provided to MCPS. The independent assessments of the Child were extensively reviewed and considered by MCPS experts. An MCPS expert accepted the independent psycho-educational evaluation of

(Continued on following page)

parents in any way failed to cooperate in the development of the IEP. On that basis the ALJ found that there was a "predetermined decision" to have Brian attend private school which precluded an award of full funding.

The Court notes, in the context of reviewing this issue that, to the extent that the ALJ's decision involves a conclusion of law as opposed to a finding of fact, it is not entitled to a presumption of correctness. The Court reviews the ALJ's conclusions of law *de novo*. *Teague Indep. Sch. Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993).

The question presented – and it is essentially a legal one – is whether parents who are committed to placing their child in private school despite what the IEP might ultimately provide (and who may nevertheless proceed with plans for the private placement) are *ipso facto* precluded from receiving full reimbursement for the placement even if it is eventually determined that the school authorities did not provide a FAPE. The Court holds that they are not.

As the Court observed in *Sanger v. Montgomery County Bd. of Educ.*, 916 F. Supp. 518, 527 (D. Md. 1996):

> Parents who unilaterally change their child's placement during the pendency of review proceedings,

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the Child but rejected the educational setting recommended. An MCPS expert accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended. MCPS experts made no effort to contact the Parents' experts and discuss those reports and recommendations. Lack of contact by MCPS experts with the Parents experts may have played a role in the failure by MCPS to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement.

> without the consent of school officials, may still seek reimbursement for any period in which the placement proposed by the school authority violated IDEA. *Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); *Amann v. Stow Sch. Sys.*, 982 F.2d 644 (1st Cir. 1992). They do so, however, at their own risk; if the school authority's placement is ultimately deemed proper, the parents will not prevail.

916 F. Supp. at 527 (footnote omitted).

The critical consideration, as the Court sees it, is not whether the parents have their minds set on private school, but whether they have cooperated in good faith to attempt to develop an IEP to the maximum extent possible. If they have not, they cannot fairly be heard to complain that the school authorities have failed to develop an IEP and consequently have failed to offer a FAPE for their child. But if they have cooperated – even if throughout they have held to the belief that the best the school authorities can offer will not be good enough – they are entitled, acting "at their own risk," to place the child privately, hoping that eventually they will be able to convince an ALJ or a judge that the child was not offered a FAPE. As citizens and taxpayers, *City of Burlington* entitles them to nothing less. If subsequent developments show that the parents were correct all along – that their child was not offered a FAPE – their mental reservations are simply irrelevant. Indeed, it is quite conceivable that parents who begin the IEP process certain that the school authorities will not be able to produce an acceptable IEP may become convinced in the course of their joint exploratory efforts with the school authorities that an acceptable IEP can in fact be produced. Additionally, parents whose disabled child is already in private school, who may feel that continuing the child in private school remains the best placement for the child, are nevertheless – as citizens and taxpayers – entitled to request the public school to attempt to develop an IEP for the child, one which might well cause them to change their minds and opt for the public instead of the private program. But in no sense should the parents be penalized merely because they may have entertained strong skepticism about the likely effectiveness of the IEP proposed by the public school authorities.

Sanger v. Montgomery County Bd. of Educ., supra, presents a useful contrast to the case at bar. In *Sanger,* the parents made it clear throughout the process that they were not inclined to consider the IEP, passing up several opportunities to go before the ARD Committee, choosing not to respond to a letter from the Local Coordinating Council that suggested a residential placement for their child and never seeking to visit the facility where the placement was proposed to be made. They were, accordingly, denied reimbursement.

In the present case, there is no indication in the ALJ's report that the parents' actions in any way thwarted the school system's ability to propose an IEP for Brian. They cooperated fully in attempting to develop the IEP, dubious though they may have been about its ultimate utility. But, as it turns out, and the ALJ has found, they were correct. Their skepticism was justified. The best that MCPS had to offer did not make the grade as a FAPE. That, in the Court's view, suffices to establish their entitlement. Accordingly, to the extent that the Court is authorized to make factual and legal findings inconsistent with those of the ALJ, it does so on this point. The parents in no way prevented the IEP from being formulated or otherwise

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failed in good faith to consider it. As a result, they are entitled to full reimbursement for the 1998-99 school year.

The decision of the ALJ will thus be REVERSED insofar as he ordered 50% reimbursement for that school year. MCPS will be ordered to make full reimbursement to the parents for the 1998-99 school year.

VII.

The final matter for consideration is the request of Brian's parents that MCPS be required to pay for Brian's educational placement at the McLean School for the 1999-00 and 2000-01 school years.

They argue that the IDEA provides "stay put" protection for a student's current educational placement as a means of preserving the status quo until the underlying IDEA litigation is resolved, citing *Drinker v. Colonial Sch. Dist.,* 78 F.3d 859, 865 (3rd Cir. 1996). *See also* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.526. MCPS argues, to persuasive effect, that Brian's parents have failed to exhaust their administrative remedies for the 1999-00 and 2000-01 school years and are therefore precluded from raising the issue in this proceeding. While MCPS developed IEPs for the school years 1999-00 and 2000-01 and the parents rejected them, they never sought due process hearings as to either.

MCPS prevails on this point. The Fourth Circuit, in the recent case of *MM v. Sch. Dist.,* 303 F.3d 523, 536 (4th Cir. 2002) held that:

> When parents of a disabled child challenge multiple IEPs in court, they must have exhausted their administrative remedies for *each academic year* in which an IEP is challenged (emphasis in original).

The parents' request for reimbursement for the school years 1999-00 and 2000-01 will therefore be DENIED.

VIII.

Summing up:

1) The Court will AFFIRM the decision of the ALJ insofar as he found that MCPS did not provide Brian with a FAPE for the school year 1998-99;

2) It will REVERSE the ALJ's decision with regard to the right of Brian's parents to receive reimbursement for Brian's private school tuition for the school year 1998-99 and will ORDER that they receive full reimbursement for that year;

3) The request of Brian's parents for reimbursement for the school years 1999-00 and 2000-01 will be DENIED.

A separate Order will be ENTERED implementing this decision, including appropriate rulings on the parties' Cross-Motions for Summary Judgment.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

FINAL ORDER OF JUDGMENT

November 21, 2002

The Court has considered pending Motions in the captioned proceeding.

Accordingly it is for the reasons set forth in the accompanying Opinion this 21 day of November, 2002

ORDERED:

1) Defendants' Motion for Summary Judgment (Paper No. 45) is GRANTED:

A) The Court AFFIRMS the decision of the Administrative Law Judge insofar as he found that MCPS did not provide Brian Schaffer with a FAPE for the school year 1998-99;

B) The Court REVERSES the decision of the Administrative Law Judge insofar as he would award Brian's parents reimbursement for only one-half of the tuition costs for that year;

C) MCPS is DIRECTED TO REIMBURSE the Schaffers for Brian's full tuition for said school year;

2) Plaintiffs' Cross-Motion for Summary Judgment (Paper No. 51) is DENIED;

3) Defendants' Motion for Preliminary Injunction (Paper No. 41) is DENIED;

4) All other pending Motions are MOOT;

5) Final judgment is ENTERED in favor of Defendants herein;

6) Counsel for the parents may submit an appropriate Petition for Fees.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn and Martin Schaffer; JOCELYN SCHAFFER; MARTIN SCHAFFER, Plaintiffs-Appellees, v. PAUL VANCE, officially as Superintendent; BOARDOF EDUCATIONOF MONTGOMERY COUNTY, Defendants-Appellants. MARYLAND ASSOCIATION OF BOARDS OF EDUCATION; NATIONAL SCHOOL BOARDS ASSOCIATION; UNITED STATES OF AMERICA, Amici Curiae.

No. 00-1471.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2 Fed. Appx. 232; 2001 U.S. App. LEXIS 363

December 4, 2000, Argued
January 10, 2001, Decided

COUNSEL: ARGUED: Zvi Greismann, MONTGOMERY COUNTY PUBLIC SCHOOLS, Rockville, Maryland, for Appellants.

Michael Jeffrey Eig, MICHAEL J. EIG & ASSOCIATES, P.C., Washington, D.C., for Appellees.

ON BRIEF: Eric B. Schwartz, Deputy Executive Director, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, Annapolis, Maryland; Julie K. Underwood, General Counsel, NATIONAL SCHOOL BOARDS ASSOCIATION, Alexandria, Virginia, for Amici Curiae Boards.

Bill Lann Lee, Assistant Attorney General, David K. Flynn, Teresa Kwong, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Judith A. Winston, General Counsel, Kala Shah Surprenant, UNITED STATES DEPARTMENT OF EDUCATION, Washington, D.C., for Amicus Curiae United States.

JUDGES: Before WILKINSON, Chief Judge, and LUTTIG and MICHAEL, Circuit Judges.

OPINION: PER CURIAM:

This case arises in the context of the formulation of an individualized education plan (IEP) under the Individuals with Disabilities Education Act (IDEA). 20 U.S.C. § 1411 et seq. The parents of Brian S. believed the IEP formulated by the Montgomery County Public School system (MCPS) would not have provided Brian with a free appropriate public education (FAPE) for the 1998-1999 school year. Accordingly, Brian's parents enrolled him in a private school and then initiated a due process hearing to obtain tuition reimbursement from MCPS. The Administrative Law Judge (ALJ) initially denied the relief requested, concluding that the IEP offered by MCPS would have provided Brian with a FAPE. Central to the ALJ's decision, however, was the conclusion that Brian's parents had the burden of proving that MCPS's IEP would not have provided a FAPE to their son.

Brian's parents appealed the ALJ's decision to the district court. The district court granted their motion for summary judgment and issued an opinion reallocating the burden of proof to MCPS. *Brian S. v. Vance*, 86 F. Supp 2d 538 (D. Md. 2000). The case was remanded to the ALJ in light of the new allocation of the burden of proof. MCPS appealed the district court's decision. The sole issue currently on appeal before this court, therefore, is that of who bears the burden of proof at an initial IEP hearing.

After briefs had been filed but prior to argument before this court, the ALJ revisited the claims made by Brian's parents. Even though the question was the subject of the pending appeal, the ALJ applied the district court's revised burden of proof scheme. After making 82 detailed findings of fact, the ALJ concluded that MCPS's proposed IEP would not have provided Brian with a FAPE. The ALJ found that Brian had a "central auditory processing" problem and that MCPS's plan failed to address this concern. The ALJ also concluded, however, that while Brian's parents were entitled to reimbursement under *Burlington School Committee v. Department of Education of Massachusetts*, 471 U.S. 359, 85 L. Ed.2d 385, 105 S. Ct. 1996 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7, 126 L. Ed.2d 284, 114 S. Ct. 361 (1993), they never seriously contemplated placing Brian in a public school. According to the ALJ, no IEP that MCPS could have proposed would have kept Brian out of private school. Thus, the ALJ granted reimbursement of only one-half of the tuition paid for Brian's private education during the 1998-1999 school year.

In light of this development, we vacate the decision of the district court and remand to that court with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits. At this stage, it remains unclear what role, if any, the allocation of the burden of proof will have on the final adjudication of Brian's claim. Moreover, there may well be cross-appeals of the ALJ's decision since neither party prevailed fully at the hearing stage. If this court is to address the issue of who has the burden of proof in challenging an initial IEP, it should be in the context of a matured case or controversy rather than in the piecemeal

fashion in which this case now appears before us. Accordingly, the judgment of the district court is vacated and remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

BRIAN S., et al., Plaintiffs v. PAUL L. VANCE, et al., Defendants.

Civil No. PJM 99-15

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, SOUTHERN DIVISION

86 F. Supp. 2d 538; 2000 U.S. Dist. LEXIS 3664

March 15, 2000, Decided
March 15, 2000, Opinion Filed

COUNSEL: For Plaintiff(s): Bogin and Eig, Washington, D.C.

For Defendant(s): Edmund W. Law, Esquire, New Market, MD.

For Defendant(s): Zvi Greismann, Esquire, Rockville, MD.

JUDGES: PETER J. MESSITTE, UNITED STATES DISTRICT JUDGE.

OPINION BY: PETER J. MESSITTE

OPINION:

I.

This case raises the important issue, not yet resolved in the Fourth Circuit, of which party in an action brought under the Individuals with Disabilities Education Act (IDEA) bears the burden of proof at the administrative due process hearing.[1] The circuits that have addressed the issue are divided, some placing the burden upon the school district, others upon the party seeking to challenge the IEP, which ordinarily means the parents. In only a few cases have courts attempted to articulate a rationale for allocating the burden of proof at this level.

In the Court's view, the better part of reason leads to the conclusion that at least where an initial IEP is brought to a due process hearing, the burden of proof lies with the school district, which in this case occasions a remand to the ALJ. In contrast, where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change. Further, as the law of this Circuit incontrovertibly establishes, once an administrative decision has been made regarding the IEP, the burden of overturning it lies with the party challenging the

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[1] The Fourth Circuit had the issue before it in *Stemple v. Board of Educ. of Prince George's County,* 623 F.2d 893, 896 (4th Cir. 1980), but declined to decide it. At least two decisions from the District of Maryland have touched upon it. In *Fritschle v. Andes,* 45 F. Supp. 2d 500 (D. Md. 1999), Judge Davis, without more, simply noted the split in authorities on the issue. *Id.* at 508 n.21. In *Schmerling v. Anne Arundel County Board of Educ.,* Civil Action No. WMN 98-2283, slip op. at 5 (D. Md. May 18, 1999), Judge Nickerson addressed the issue squarely, declining to establish a "hard-and-fast rule for all IDEA cases." On the facts, however, he affirmed the Administrative Law Judge (ALJ) who had placed the burden of proof on the parents to establish that an initial individualized education program (IEP) was inappropriate. Judge Nickerson reasoned that certain presumptions apply in IDEA cases, including a presumption of correctness of the IEP. Id., slip op. at 5-6 (citing *Johnson v. Independent Sch. Dist. No. 4,* 921 F.2d 1022, 1026 (10th Cir. 1990)). He also cited a presumption in favor of "mainstreaming" which the IEP had proposed for the child in that case. Id., slip op. at 6. Judge Nickerson pointed out that plaintiffs themselves had "participated in the proceedings as though they had the burden" and had gone through the proceeding without objection. Id., slip op. at 10. The Court respectfully disagrees with Judge Nickerson that a "hard-and-fast" rule should not be laid down in these cases or, as the Court will now undertake to explain, that the burden is upon the parents when they disagree with an initial IEP.

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administrative decision. See *Tice v. Botetourt County Sch. Bd.*, 908 F.2d 1200, 1206 n.5 (4th Cir. 1990).

II.

Jocelyn and Martin S. seek reimbursement of the costs incurred by them for enrolling their son Brian in a private school for disabled children. They contend that the Montgomery County Public Schools system (MCPS)[2] failed to provide Brian with a free appropriate education as required under the IDEA, 20 U.S.C. § 1400 et seq.

There is no question that Brian is a child who is learning disabled, language-impaired and other health impaired. He has been diagnosed as having attention deficit hyperactivity disorder and needs special education and related services to benefit from school attendance. From kindergarten through seventh grade, Brian attended Green Acres School, a private school in Montgomery County where, despite small class size and significant accommodations as well as parentally provided extra services, he did not succeed.

In November 1997, Brian's mother contacted the Montgomery County school authorities and requested special education services for the 1998-99 school year, submitting outside evaluations of Brian. After reviewing the outside evaluations and conducting additional tests, MCPS found Brian eligible for special education and proposed a part-time placement for him at Hoover Middle School, with an alternative placement at the Robert Frost Middle School. This was Brian's initial IEP.

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[2] Defendant Paul Vance was at all relevant times Superintendent of the MCPS system.

Because his parents believed the IEP drafted for Brian was not reasonably calculated to provide him with appropriate educational benefit, they notified administrative authorities that they rejected the proposed placement. In May of 1998, they requested an administrative due process hearing, citing the school system's purported failure to provide Brian with a free appropriate public education. More or less simultaneously, anticipating the beginning of a new school year in the fall, Brian's parents enrolled him for the 1998-99 school year at the McLean School, a private school for learning and language disabled students located in Montgomery County.

Over three days in June and July 1998, a due process hearing was convened before an ALJ who concluded shortly after that the school authorities had offered Brian a free appropriate education. Accordingly, Brian's parents' claims for reimbursement of the tuition and costs of Brian's placement at the McLean School for the 1998-99 school year were denied.

The ALJ was particularly concerned about which party bore the burden of proof and, at the end of the first day of the hearing, asked counsel to submit brief memoranda of law on the issue. In his subsequent written decision, he stressed how important the allocation of the burden was to the outcome of the case:

> There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of

> what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

Decision at 29 (emphasis supplied).

Acknowledging that "[t]he case law provides support for assigning that burden to either party," he opted for the rationale expressed by the U.S. Court of Appeals for the Fifth Circuit in *Alamo Heights Independent School District v. State Board of Education,* 790 F.2d 1153, 1158 (5th Cir. 1986) (quoting *Tatro v. Texas,* 703 F.2d 823 (5th Cir. 1983), aff'd, 468 U.S. 883 (1984)):

> [The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parent." In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, . . . [The IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."

See Decision at 30.

Given the reluctance of the Fourth Circuit, as stated in *Tice,* 908 F.2d at 1207, "to second-guess the judgment of education professionals," the ALJ held that:

> In the matter *sub judice,* the Parents bear the burden of persuasion in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.

Decision at 31.[3]

The ALJ then proceeded to discuss various aspects of the record in favor of and against the proposed IEP. He cited the testimony of Drs. Ruth D. Spodak and Carol A. Kamara, Brian's experts on learning disabilities and speech/language pathology respectively. Both stated that the IEP failed to offer an appropriate educational benefit, since in their view Brian requires small, self-contained special education classes of a kind not included in the IEP. Dr. Spodak testified that such classes were essential to Brian's education because they would tend to minimize the distractions interfering with Brian's ability to learn. Dr. Kamara testified that Brian suffers from a "central auditory processing" problem that increases his susceptibility to distractions, necessitating a small, self-contained learning environment.

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[3] In a footnote to this statement, the ALJ cited an additional reason for assigning the burden of proof to Brian's parents. He found that they were apparently committed to sending Brian to McLean School regardless of what the IEP might show, terming their appearance at the ARD meeting "a mock effort." Decision at 32 n.6. Assuming the parents were irrevocably committed to McLean, that might undercut any claim by them that the school authorities failed to develop a plan, see, e.g., *Sanger v. Montgomery County Bd. of Educ.,* 916 F. Supp. 518, 525 n.7 (D. Md. 1996). But there is no reason why the parents' decision should occasion a shift in the burden of proof. Parents may unilaterally change their child's placement during the pendency of review proceedings, without the consent of school officials, and may receive reimbursement if it is later determined that the proposed placement violated the IDEA. Parents act at their own risk, however, if it is eventually determined that the IDEA was not violated. *Id.* at 527.

On the other hand, the ALJ noted that Dr. Spodak's testimony differed in some respects from an earlier report she and members of her staff had written about Brian's learning disabilities. This, along with the fact that she herself had spent only ten minutes with Brian, caused the ALJ to "question[] the probative value of Dr. Spodak's opinion." Decision at 36. Similarly, the ALJ noted that Dr. Kamara's opinion was compromised to some extent by her acknowledgment of the diagnostic limitations of the test she relied upon in diagnosing Brian's "central auditory processing" problem and by her refusal to offer an opinion as to whether Brian's speech-language disability is mild, moderate, or severe. Finally, the ALJ noted that two experts from MCPS, Dr. Barbara J. Butera and Pamela Zahra, a speech pathologist, testified that the IEP was appropriate to Brian's needs and that, in their view, he suffers not from a "central auditory processing" problem but from a mild speech-language disability.

Ultimately, the ALJ concluded that the parents had not carried their burden of proof:

> The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

Decision at 42.

Before the Court, Brian's parents argue, among other things, that the ALJ erred in assigning the burden of proof

to them. The parties have filed Cross-Motions for Summary Judgment on this and other points.[4]

III.

Deferring case citations for a moment, it may be useful to begin by considering the different settings in which a challenge to an IEP may arise:

1) there is the initial IEP, proposed by the school authorities the first time it is sought for a child, with which the parents do not agree and as to which they seek an administrative due process hearing;

2) there is the existing IEP, at one time agreed to by everyone, which either the parents or the school district seek to change against the wishes of the other, whereupon the matter goes to an administrative due process hearing; and

3) there is the IEP that has been passed upon by an independent ALJ, which a party seeks to challenge in a court proceeding.[5]

The cases do not ordinarily make these distinctions, but in fact there appears to be reason to do so.

In the last scenario, the law and policy considerations are the most sharply defined. As indicated, in the Fourth

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[4] Because the burden of proof issue is dispositive, the Court does not address the other issues raised by the parties in their Motions.

[5] There is at least one further scenario, in which both the parents and the school district seek to change an existing plan. Discussion of which party has the burden of proof in that setting is best left for another day.

Circuit the burden of proof on appeal from an administrative decision is upon the party challenging the decision. *See Barnett v. Fairfax County Sch. Bd.*, 927 F.2d 146, 152 (4th Cir. 1991); *Tice*, 908 F.2d at 1206 n.5; *Spielberg v. Henrico County Public Schools*, 853 F.2d 256, 258 n.2 (4th Cir. 1988). This, according to the Fourth Circuit, arises out of deference to the underlying state administrative process. *Tice*, 908 F.2d at 1206 n.5. This undoubtedly flows from the general belief that, once an impartial judicial hearing has been held and a decision made – even at the administrative level – the burden of overturning the decision ought to be upon the party challenging it.[6]

Moving back to the next scenario, where an existing IEP is sought to be changed, if for no other reason than that it seems "fair[]," *Tatro v. State of Texas*, 703 F.2d 823, 830 (5th Cir. 1983), it is not unreasonable to conclude that the burden of persuasion as to the change should be borne by the party seeking the change. Numerous cases so hold. *See, e.g., Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 467 (5th Cir. 1995); *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent Sch. Dist. No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights*, 790 F.2d at 1158; *Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 919 (1st Cir. 1983); *Tatro*, 703 F.2d at 830.[7]

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[6] But not all circuits agree that assignment of the burden should be thus. In *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995), for instance, the Third Circuit held that the burden should always be upon the school district. *See also Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

[7] It is not always clear from the language of these cases whether they are addressing the burden of proof at the administrative level, in the district court, or both. The cases are often characterized, however,

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These authorities are in accord with the observation made by Professor Wigmore that the burden of proof is frequently placed "upon the party to whose case the fact is essential," 9 Wigmore on Evidence, § 2486 at 288 (italics omitted). In the context of an IDEA case, this argues for the proposition that the party seeking a change in the IEP should have to explain why the change is appropriate.

Despite this, a number of cases hold that the burden of proof at the administrative level should always lie with the school district, even when the parents are seeking to change an existing IEP. *See Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *see also Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 122 (2d Cir. 1998); *E.S. v. Independent Sch. Dist., No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1034-35 (3d Cir. 1993); *Lascari v. Board of Educ. of Ramapo Indian Hills Regional High Sch. Dist.*, 116 N.J. 30, 44, 560 A.2d 1180, 1188 (1989).

The reasoning of these holdings varies from none at all, i.e. from mere assertion, to a brief reference to the statutory obligation to accommodate disabled children, to, in very few cases, a rather elaborate explanation. Among the cases that merely assert that the burden is on the school district are *Clyde K*, 35 F.3d at 1398, and *Walczak*,

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as standing for the proposition that the party seeking to change an existing IEP bears the burden of proof at the administrative level. See, e.g., *T.H. v. Board of Educ. of Palatine Community Consolidated Sch. Dist. 15*, 55 F. Supp. 2d 830, 835 n.5 (N.D. Ill. 1999); Schmerling, slip op. at 5; *Manchester Sch. Dist. v. Charles M.F.*, 1994 U.S. Dist. LEXIS No. CIV. 92-609-M, 1994 WL 485754, at *4 (D.N.H. Aug. 31, 1994).

142 F.3d at 122. In the middle category is *Wall v. Mattituck-Cutchogue School District,* 945 F. Supp. 501 (E.D.N.Y. 1996), to wit:

> It has consistently been held that the burden throughout the administrative process is placed upon the school district. . . . This is in obvious recognition of the school's overarching obligation to attend to the specific educational needs of children with disabilities. See S.Rep. No. 94-168 to P.L. 94-142, at 9, reprinted in 1975 U.S.C.C.A.N. 1425, 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity").

945 F. Supp. at 511 (citations omitted).

Undoubtedly the most elaborate rationale is set forth in *Lascari,* which bears quoting *in extenso:*

> We believe it is more consistent with the State and federal scheme to place the burden on the school district not only when it seeks to change the IEP, but also when the parents seek the change.
>
> Various considerations lead us to that conclusion. Underlying the State and federal regulations is an abiding concern for the welfare of handicapped children and their parents. Consistent with that concern, the basic obligation to provide a handicapped child with a free, appropriate education is placed on the local school district. It is the district that must identify handicapped children and then formulate and implement their IEPs. Finally, the regulatory scheme vests handicapped children and their parents with numerous

> procedural safeguards. Those safeguards include the right to counsel and to the advice of experts, 20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.508(a)(1); to present evidence and cross-examine witnesses, 20 U.S.C. § 1415(d)(2); 34 C.F.R. § 300.508(a)(2); to "have the child who is the subject of the hearing present," id. at § 300.508(b)(1); and to a public hearing, id. at § 300.508(b)(2). Like those procedural safeguards, the allocation of the burden of proof protects the rights of handicapped children to an appropriate education.
>
> Our result is also consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens. In the past, we have placed either the burden of production, see *Ryan v. Mayor & Council of Borough of Demarest,* 64 N.J. 593, 604-05, 319 A.2d 442 (1996), or the burden of proof on the party with the better access to relevant information, *Andersen v. Exxon Co.,* 89 N.J. 483, 500, 446 A.2d 486 (1982); *Brundage v. New Jersey Zinc Co.,* 48 N.J. 450, 475-77, 226 A.2d 585 (1967). The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. Cf. *S-1 v. Turlington,* 635 F.2d 342, 348-49 (5th Cir.) (burden on district to raise question whether student's misconduct is based on handicap because parents lack wherewithal to know rights under EAHCA), cert. denied, 454 U.S. 1030, 102 S. Ct. 566, 70 L. Ed. 2d 473 (1981), abrogated on other

> grounds by *Honig v. Doe,* 484 U.S. 305, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

116 N.J. at 44-45; 560 A.2d at 1188.[8]

As to the first scenario – that in which an initial IEP is disputed at a due process hearing – all of Lascari's considerations came into play but there is more. In the initial situation, unlike the change situation, the parents have never agreed that the IEP is appropriate. By definition, they have disagreed and sought a determination by an impartial hearing officer, one, it may be noted, who by law may not be associated with the school authority. 20 U.S.C. § 1415(f)(3). In this circumstance, the only sense in which "change" is involved is that the parents wish to change what the school authorities have unilaterally proposed. Since the IEP is supposed to be a joint enterprise, it is debatable whether an IEP can even be said to exist if a parent has never agreed to it. The situation seems much like that in which two parties are engaged in a dispute before litigation has occurred, following which litigation is initiated. If one assumes, again along with

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[8] This Court would add a further observation: The Congressional statements and declarations that appear at the beginning of the IDEA refer to minority children, e.g. 20 U.S.C. § 1400(b)(7) to (10), in particular economically disadvantaged minorities. Id. at § 1400(b)(8)(C). Strictly speaking, if parents such as these have the burden of persuasion at the administrative level, their failure to put on a prima facie case would mean that the school district could rest without having to produce any evidence in justification of the IEP. On the other hand, parents who could afford to retain counsel and experts, while still having the burden of persuasion, could at least force the school district to produce evidence in support of the IEP. Query, whether such a result is fair, apart from whether Congress could have intended it.

Wigmore, that "the party having in form the affirmative allegation" should carry the burden, see Wigmore, § 2486 at 288 (italics omitted), it would seem entirely reasonable to assign the burden to the school authority to affirmatively establish the propriety of its plan.[9] As one commentator has pointed out, this in no way reflects a lack of deference to the expertise of the school authorities. But there may be, she writes, a tendency to "confuse the Rowley Court's deference to school officials on methodological matters with matters of burden of proof." Dixie Snow Huefner, "Judicial Review of the Special Educational Program Requirements Under the Education for All Handicapped Children Act: Where Have We Been and Where Should We Be Going?" 14 Harv. J.L. & Pub. Pol'y 483, 512 (1991). To acknowledge the expertise of school officials is not the same as saying that they should not have to demonstrate to an impartial fact-finder, at least in the first instance, that the proposed goals and objectives of the IEP address the student's needs, or that the IEP delivers services to those needs in a way that will provide progress towards those goals and objectives, or that the proposed criteria to evaluate the child's progress are in place and can actually measure the extent to which the objectives are obtained. Id.

Wigmore summarizes the burden of persuasion issue thus:

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[9] Of course the same argument could be made in support of assigning the burden to the school board at any level – that it should always be required to demonstrate the affirmative of the plan that it proposes. That, in fact, appears to be the rationale of those cases that have assigned the burden to the school board at all levels.

> There is . . . no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given class of cases. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any.
>
> There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

Wigmore, § 2487 at 292 (footnotes omitted).[10]

To the extent that the Court writes on a clean slate, it holds that with regard to an initial IEP, experience and fairness dictate that the school district should have the burden of proof at any administrative due process hearing that might follow. While the issue is not squarely presented by this case, in order to avoid any confusion in the matter, it seems opportune to posit as equally reasonable that, when a change is sought in an existing IEP, the party seeking the change should have the burden of proof.

IV.

Applying these considerations to the facts of the present case, the Court concludes that the ALJ erred in his allocation of the burden of proof. Because he himself saw

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[10] Accord Edmund M. Morgan, Basic Problems of Evidence 28 (4th ed. 1963):

> The truth seems to be, and many of the modern decisions expressly state, that the allocation of the burden is to be determined by considerations of fairness, convenience and policy. Such considerations require the exercise of a sound judgment and prior judicial experience, as revealed in past decisions, has strong persuasive effect.

the allocation issue as "critical" to the outcome, eventually holding that the parents had failed to sustain their burden, the Court is unable to say how the ALJs' decision might differ if the burden of proof were properly assigned. The Court declines, at this stage at least, to substitute its own weighing of the evidence for that of the ALJ.

Under the circumstances, the Court deems it appropriate to remand the case to the ALJ for proceedings consistent with this Opinion.

A separate Order will issue implementing this decision.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

March 15, 2000

ORDER

Accordingly, for the foregoing reasons, it is this 15th day of March, 2000 ORDERED:

1) Plaintiff's Motion for Summary Judgment is GRANTED;

2) Defendant's Motion for Summary Judgment is MOOT;

3) This case is REMANDED to the Administrative Law Judge for proceedings consistent with this Opinion; and

4) The Clerk of Court shall CLOSE this case.

PETER J. MESSITTE

UNITED STATES DISTRICT JUDGE

BRIAN SCHAFFER, A MINOR,	* **BEFORE STEPHEN J.** * **NICHOLS**
BY HIS PARENTS,	* **ADMINISTRATIVE** * **LAW JUDGE**
JOCELYN AND MARTIN SCHAFFER,	* **OF THE MARYLAND** * **OFFICE OF**
AND AS HIS NEXT FRIENDS	* **ADMINISTRATIVE** * **HEARINGS**
VS.	*
MONTGOMERY COUNTY	* **Old OAH# 98-MSDE-** * **MONT-OT-016662**
PUBLIC SCHOOLS	* **New OAH# MSDE-** * **MONT-OT-00000214**

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DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
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CONCLUSIONS OF LAW
ORDER
APPEAL RIGHTS
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STATEMENT OF THE CASE

This case arises from a request by Jocelyn S. Schaffer and Martin P. Schaffer ("Parents"), the mother and father, respectively, of Brian Schaffer ("Child"), for a hearing to review the provision of a free appropriate public education ("FAPE") for the Child as a student with disabilities for the 1998-1999 school year. The local education agency responsible for providing the Child a FAPE is the Montgomery County Public Schools ("MCPS"). On May 26, 1998, the Parents filed the request with the MCPS.[1]

Pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(c) (1997), 34 C.F.R. § 300.510 (1996), Md. Code Ann., Educ. § 8-413 (1997), and the Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings, the above-captioned case was heard over a period of three days (June 16, 1998, June 23, 1998, & July 2, 1998) before Stephen J. Nichols, Administrative Law Judge ("ALJ"), Office of Administrative Hearings. The hearing was conducted at the offices of the MCPS, 850 Hungerford Drive, Rockville, Maryland. Michael J. Eig, Esquire, Bogin and Eig, P.C., represented the Parents and Child. Edmund W. Law, Esquire, represented the MCPS.

On July 9, 1998, a decision was issued by the ALJ. That decision concluded that the Individual Education Program drafted for the Child for the 1998-1999 school year, and the placement(s) offered by MCPS for the Child, afforded the Child an opportunity for a FAPE for the 1998-1999 school year. The ALJ denied the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

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[1] In pertinent part, the Request For Due Process Hearing reads:

> "[The Child] is a student in Montgomery County, Maryland. At issue is whether the placement recommended by MCPS for the 1998-1999 school year at Hoover Middle School is appropriate, and if not, whether the placement at the McLean School is appropriate. Parents have duly notified MCPS of their intention to enroll [the Child] at the McLean School and have informed them of their disagreement with the proposed program. The placement at Hoover is too large, not structured enough, has insufficient services and does not include required related services. Additionally, we are in disagreement with the [i]ntensity of service proposed and do not believe it complies with COMAR requirements. The IEP is also at issue as we do not believe MCPS has identified [the Child's] complete disability and have not signed the IEP. . . ."

The Parents and Child appealed the ALJ's decision to federal court. On March 15, 2000, the Honorable Peter J. Messitte in *Brian S., et al. vs. Paul L. Vance, et al.*, Civil No. PJM 99-15, United States District Court (MD), granted a Motion for Summary Judgement on behalf of the Parents and Child and issued an opinion reallocating the burden of proof from that applied by the ALJ in the July 9, 1998 decision. The United States District Court further issued an order of remand to the ALJ directing further administrative proceedings in this matter consistent with that opinion.

After several pre-hearing telephonic conferences with counsel for both parties, the ALJ issued a pre-hearing conference order in order to conduct a "review of the record" as it existed, to reconsider findings of fact as found and/or to consider additional findings of fact proposed by the parties. A request by the Parents and Child to present additional evidence during the remand hearing was denied. The parties were directed to provide pre-hearing written statements to identify findings of fact in the decision issued by the ALJ on July 9, 1998, to be reconsidered and/or to add proposed findings of fact in this case. Not later than October 10, 2000, those pre-hearing written statements were received by the ALJ from both parties.

A two-day remand proceeding was held. On October 24, 2000, a review of the existing record was conducted by the ALJ *in camera* at the Administrative Law Building in

Hunt Valley, Maryland. Counsel were excused from attending the first day of the remand proceeding. On October 25, 2000, the second day of the remand proceeding took place. The second day provided an opportunity for the parties to present oral argument and was held at the offices of the Office of Administrative Hearings located in Wheaton, Maryland. Michael J. Eig, Esquire. Michael J. Eig and Associates, P.C. represented the Parents and Child. Zvi Greismann, Esquire, represented the MCPS.

Procedure in this case is governed by the "contested cases" provisions of the Administrative Procedure Act. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp 2000) and the Rules of Procedure of the Office of Administrative Hearings, Code of Maryland Regulations ("COMAR") 28.02.01

ISSUES

The issues in this matter are:

(1) Whether the Individual Education Program ("IEP") prepared for the Child by the MCPS, and/or the placement(s) for the Child offered by MCPS, afforded the Child an opportunity for a FAPE for the 1998-1999 school year:[3] and

(2) Whether the Parents should be reimbursed for unilateral placement of the Child at the McLean School of

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[3] An IEP is a "blueprint" for assisting a student with special education needs. Its development requires evaluation of the disabled student's present level of performance and his unique needs for special education and any related services. The IEP is to be reviewed not less than annually by school officials and the student's parents or guardians and revised as needed. 20 U.S.C. § 1414(Q)(1997)

Maryland for the 1998-1999 school year under the law outlined in *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir. 1991); and *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

SUMMARY OF THE EVIDENCE

EXHIBITS

At the hearing conducted on June 16, 1998, June 23, 1998, & July 2, 1998. MCPS submitted thirty-three (33) documents admitted into the record as exhibits and the Parents submitted nineteen (19) documents admitted into the record as exhibits. The parties stipulated to the admission of the majority of each others' exhibits. Many of the exhibits admitted on behalf of each party are duplicated in the exhibits of the opposing party. A complete list of the exhibits that were admitted is found in the appendix to this decision.

WITNESSES

At the hearing conducted on June 16, 1998, June 23, 1998, & July 2, 1998. Caroline MacNichol, Custodian of Records. McLean School of Maryland; Linda J. Brand, Special Education Teacher, Herbert Hoover Middle School, MCPS; Barbara J. Butera, School Psychologist, MCPS; Pamala Zahra. Speech/Language Pathologist, Herbert Hoover Middle School, MCPS; Doris Shiery, Special Education Teacher, Robert Frost Middle School, MCPS, and Vickie Strange-Moscoso, Special Education Supervisor, MCPS, testified on behalf of the local education agency.

Linda J. Brand was admitted as an expert witness in special education. Barbara J. Butera was admitted as an expert witness in school psychology. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology Doris Shiery was admitted as an expert witness in special education.

Ruth B. Spodak, Ph.D., Ruth B. Spodak, Ph.D., & Associates; Carol A. Kamara, Ph.D. CCC-SLP/A. The Kamara Center, Nancy Shapiro, Head of the Middle School, Green Acres School; and the Child's mother testified on behalf of the Parents and the Child.

Ruth B. Spodak was admitted as an expert witness in psychology and learning disabilities Carol A. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology.

FINDINGS OF FACT

Based upon the evidence presented, and after reallocating the burden of proof from the Parents and Child to MCPS, the ALJ finds the following facts by a preponderance of the evidence:

1. The Child's date of birth was May 13, 1984.

2. The Child has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and has been receiving medication for this diagnosis since he was 7 years old. Since Spring 1997, the Child has been taking Welbutrin. His medication was changed from Dexedrine to Welbutrin because Dexedrine, although it was more effective, caused depression and had to be discontinued.

3. The Child has attended Green Acres School since pre-kindergarten. Green Acres School is not part of the MCPS. Green Acres School is a private school. Before the 1997-1998 school year, while he was attending Green Acres, the Parents did not request assessment of the Child as a student with disabilities under IDEA or other support from MCPS. Green Acres School does not have a special education program. Green Acres has small classes and often makes accommodations to address the educational needs of its students.

4. The travel time from the Child's home to Green Acres School is approximately 15 minutes.

5. While a student at Green Acres, the out-of-the-ordinary educational needs of the Child were recognized. The teachers and administrators at the school consulted with Charla Levine, a MA special needs consultant, who made recommendations on how the school could accommodate the Child's educational needs.

6. While attending Green Acres, the Child demonstrated difficulty with productivity and quality of class work. In 2nd grade, the Child pretended that he was reading during silent reading time. In 3rd grade, the teacher worked with the Child on reading comprehension using 2nd grade materials. In 4th grade, tutoring began and continued through 5th, 6th, and 7th grades.

7. During the 1997-1998 school year, because of his prior academic performance, the Child attended Green Acres 7th Grade class on a probationary status.

8. During the 1997-1998 school year, the Child was in regular education classes with a student-to-teacher ratio of not greater than 13:1. The Child experienced

difficulty with writing and reading tasks. Class work productivity was a significant problem. The Child had difficulty staying on task.

9. During the 1997-1998 school year, the Child was receiving instructional classroom and testing accommodations because of his learning difficulties. Accommodations for the Child at Green Acres School included individual attention from classroom teachers, a peer buddy to ask for clarification of direction, priority seating, working with a tutor 3 times per week, reading support, extra time on class assignments and standardized tests, tutor rewriting of essay questions on his tests to multiple choice or short answer, assignments not penalized if turned-in late, and exclusion of Spanish class from his educational program.

10. While Green Acres School made more accommodations, its teachers and administrators came to believe that the Child needed more support than the school could offer. During October 1997, at a meeting with Green Acres School staff, the Child's mother was told that the Child needed placement for the next school year in a school designed to address his learning difficulties.

11. At Green Acres School, the Child received a passing grade in all his subjects for the third trimester of the 1997-1998 school year.

12. The Herbert Hoover Middle School is part of the MCPS system.

13. On November 7, 1997, the Child's mother telephoned the Herbert Hoover Middle School and spoke with Linda Brand, a MCPS special education teacher. The Child's mother indicated she wanted the Child assessed

for identification as a student with disabilities. During this phone conversation, the Child's mother stated that she had to find another private school for the Child to attend, and she mentioned the Lab School as a possibility. Linda Brand informed the Child's mother that MCPS had a wide variety of services to meets [sic] the needs of students with a variety of disabilities and MCPS may have a program that would meet the Child's needs.

14. On November 11, 1997 the Child's mother contacted the office of Carol A. Kamara, Ph.D. CCC-SLP/A, an independent speech-language pathologist/audiologist, for the purpose of arranging for a communication assessment of the Child.

15. On December 9, 1997, Carol A. Kamara conducted a comprehensive speech and language assessment of the Child employing a variety of formal and informal measurements. The assessment took 3-4 hours.

16. After the December 9, 1997 assessment, Carol A. Kamara produced a written report. The written report reads, "[the Child's] auditory processing of words was so severely impaired by discrimination issues that his ability to execute any auditory tasks should be considered possibly compromised by this one feature." The written report also reads, that the Child's oral motor evaluation "pattern suggested some articulation dyspraxia". . . . The report recommends, "[the Child's] serious needs in reading, writing, spelling, and probably math, indicate that he should be placed in a self-contained, full-day special education program." (MCPS Exhibit #3)

17. On December 19, 1997, the Child's mother provided Green Acres School with an "Authorization For Release Of Confidential Information" in order that the Child's academic records could be sent to the McLean School and to the Lab School in Washington, D.C. The McLean School of Maryland and the Lab School are private schools. (MCPS Exhibit #32)

18. On December 30, 1997, the Parents submitted an application for admission of the Child as a student in the 8th Grade at the McLean School of Maryland for the 1998-1999 school year. The Parents also submitted an application for admission of the Child as a student in the 8th Grade at the Lab School.

19. During December 1997, the Parents met for one hour with Ruth B. Spodak, Ph.D., a psychologist, at the offices of Ruth B. Spodak, Ph.D. & Associates, to provide her with the Child's history as part of arranging for an independent psycho-educational evaluation of the Child.

20. On January 5, 1998, the Child came to the offices of Ruth B. Spodak, Ph.D. & Associates. There he met with Ruth Spodak for 10-15 minutes prior to testing conducted by her associates. On January 5, 1998 and January 6, 1998. Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted psycho-educational testing of the Child. The full evaluation conducted by Ruth B. Spodak, Ph.D. & Associates, included a review of records, information obtained from the Parents, formal testing, and behavioral observations of the Child.

21. After the evaluation of the Child, Ruth Spodak, Diane Toby, and Deanna Greenstein produced a written

report. The report discussed the social/emotional functioning, potential for academic achievement, and cognitive abilities of the Child. The report indicated that the Child was bright and intelligent. The report indicated that because of the Child's learning difficulties, his cognitive test results (in the average range of intelligence) underestimated his true abilities. An excerpt from the report reads. "[the Child] will do best in a small, structured setting, where expectations are clear and consistent." (MCPS Exhibit #7)

22. On January 14, 1998, MCPS sent a letter to the Parents advising that a "screening [Admission, Review, and Dismissal ("ARD") committee] meeting" had been scheduled by MCPS at the Herbert Hoover Middle School on January 29, 1998. The purpose of this meeting was, "to discuss [the Child's] educational needs, determine whether an educational disability is suspected, and determine follow up-assessment as needed." (MCPS Exhibit #9)

23. The ARD committee meeting scheduled for January 29, 1998, was rescheduled at the request of the Parents. The attorney for the Parents had a schedule conflict on January 29, 1998.

24. On February 19, 1998, Linda Brand observed the Child at Green Acres, reviewed teacher reports, classroom observations, and spoke with Nan Shapiro, Head of the Middle School, Green Acres School.

25. On February 26, 1998, a meeting of the ARD committee at the Herbert Hoover Middle School was held. Those attending the meeting included, among others, the Parents: an attorney for MCPS; Caroline Kursman, Principal, Herbert Hoover Middle School; Jeff Hill, Assistant Principal, Herbert Hoover Middle School; Linda Brand, special education teacher, Herbert Hoover Middle School; Nancy Shapiro, Head of the Middle School, Green Acres School, Barbara Butera, School Psychologist, MCPS; and Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School.

26. The Parents fully participated in the ARD committee meeting held on February 26, 1998.

27. Test results, teacher referrals, observation reports, a parent questionnaire, and educational records of the Child were reviewed by the ARD committee before the February 26, 1998 meeting. These documents included, but were not limited to, an observation report from Nancy Shapiro, Head of the Middle School, Green Acres School, a report from Charla Levine, Special Needs Consultant, Green Acres School, Narrative Report Cards on the Child from Green Acres School; an observation report of the Child at Green Acres School from Linda Brand; and reports of private assessments of the Child (from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A).

28. At the February 26, 1998 ARD committee meeting, the educational history of the Child was discussed. As a result of the meeting, the ARD committee "[suspected][the Child] may have a [speech-language] disability, and/or learning disability in [areas] of reading [and/or] writing." (MCPS Exhibit #15)

29. The ARD committee decided to further review the private assessments of the Child (from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A) that were provided to the committee, to conduct informal assessments of the Child, and to reconvene to evaluate the Child's needs in conjunction with all data.

30. At the end of the February 26, 1998 ARD committee meeting, the Parents were told that the next meeting of the ARD would be an evaluation meeting to determine if the Child met the criteria for special education services as a student with a disability.

31. At the end of the February 26, 1998 ARD committee meeting, MCPS obtained permission from the Parents to conduct its own assessments of the Child (as appropriate), to contact Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D. CCC-SLP/A (in order to discuss their reports), and to contact the Child's teachers and tutor at Green Acres School (to gain information on the Child). If MCPS sought to conduct additional formalized testing of the Child its personnel were to notify the Parents of that additional formalized testing.

32. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. The letter of acceptance specified that the Parents would have to pay a non-refundable enrollment fee of $750.00 by March 16, 1998, in order to reserve a place for the Child for the 1998-1999 school year. By March 16, 1998, the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee that a placement would be available for the Child at that school for the 1998-1999 school year.

33. Select MCPS members of the February 26, 1998 ARD committee were assigned to review the private assessments of the Child from the perspective of their expertise, conduct further informal assessments of the Child as indicated, and to make a report to the next ARD committee meeting.

34. Linda Brand reviewed the reports of the private assessments of the Child (from Ruth B. Spodak, Ph.D & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A).

35. On March 12, 1998, Linda Brand met with the Child at the Herbert Hoover Middle School. During this meeting, Linda Brand administered the Reading Comprehension test of the Wechsler Individual Test of Achievement and the Qualitative Reading Inventory to the Child and conducted an informal assessment of the Child's needs for special education services.

36. Linda Brand prepared goals and objectives for the Child's IEP that were intended to incorporate his needs, from the special education perspective, identified in the reports of the assessments of the Child from Ruth B. Spodak, Ph.D. & Associates, and Carol A. Kamara, Ph.D. CCC-SLP/A.

37. Pamala Zahra reviewed the report of the private assessment of the Child conducted by Carol A. Kamara, Ph.D. CCC-SLP/A.

38. On March 12, 1998, Pamala Zahra met with the Child at the Herbert Hoover Middle School and conducted an informal assessment of the Child over a period of one hour. This informal assessment included, among other activities, several tasks designed to informally assess the Child's phonological processing skills and the administration of one subtest. Understanding Ambiguous Sentences, from the Test of Language Competence. Pamala Zahra did some contextual listening, sound discriminating activities and verbal reasoning activities for language competence.

39. Pamala Zahra disagreed with some of the Child's needs identified in the report of the assessment conducted by Carol Kamara. Pamala Zahra disagreed with Carol Kamara's conclusion that the Child had weak phonological or sound system skills. Pamala Zahra did not agree that the Child had "severe auditory processing difficulties related to discrimination at the word level," and "articulation dyspraxia" (MCPS Exhibit=20)

40. Pamala Zahra prepared goals and objectives for the Child's IEP that were intended to incorporate his needs, from the speech-language perspective, identified in the report of the assessment from Carol Kamara, with which she had agreed.

41. Barbara Butera reviewed the report of the psycho-educational evaluation of the Child from Ruth B. Spodak, Ph.D. & Associates.

42. On March 12, 1998, Barbara Butera met with the Child at the Herbert Hoover Middle School. During this meeting, Barbara Butera interviewed the Child, administered the Behavior Assessment System for Children (BASC) to the Child, and observed the Child's interaction with Linda Brand and Pamala Zahra.

43. Barbara Butera's observation and psychological assessment of the Child on March 12, 1998, was consistent with the assessment of the Child presented in the report on the Child from Ruth B. Spodak, Ph.D. & Associates.

44. On March 13, 1998, MCPS sent a letter to the Parents advising that an ARD meeting had been scheduled by MCPS for March 26, 1998. The notice also offered an alternate date of April 6, 1998, for the meeting. The purpose of this meeting was, "to determine the answers to the following questions:" (MCPS Exhibit #18)

> 1 Does the assessment indicate the presence of a disability?
>
> 2 Is [the Child]educationally disabled?
>
> 3 If there is an educational disability, what are the goals and objectives for the Child's [IEP]?
>
> 4 What amount of special education and related service is necessary to meet [the Child's] goals and objectives in the least restrictive environment (LRE)?
>
> 5 What is the appropriate placement to meet the identified goals and objectives?

45. On April 6, 1998, the MCPS held a second ARD committee meeting on the Child. Those attending the meeting included, among others, the Parents, an attorney for the Parents, an attorney for MCPS, Caroline Kursman, Jeff Hill, Linda Brand, Barbara Butera, and Pamala Zahra.

46. The April 6, 1998 ARD committee received and considered reports provided by Linda Brand, Barbara Butera, and Pamala Zahra on the Child (and on the private assessments of the Child from Carol A. Kamara, Ph.D., CCC-SLP/A, and Ruth B. Spodak, Ph.D. & Associates).

47. The Parents fully participated in the ARD committee meeting held on April 6, 1998.

48. At the April 6, 1998 meeting, the ARD Committee reviewed available information, discussed the Child's

need for special education and related services, and drafted an IEP for the Child for the 1998-1999 school year.

49. On April 6, 1998, the ARD Committee identified the Child as a student with a speech-language disability and a learning disability.

50. The April 6, 1998 IEP specified an Intensity IV special education program for the Child with 15.8 hours of special education and .75 hours (45 minutes) of speech-language therapy as a related service each week.[3] Under the IEP, the special education services would be provided in an "inclusion model" setting during the Child's World Studies, Science and English classes. The Child was to be in a regular education class for Math, Physical Education, and Arts Rotation. The Child was also to receive one period (45 minutes) of support each day in a self-contained special education writing resource class in lieu of the requirement of a class in foreign language.

51. Supplementary aids and services specified in the Child's April 6, 1998 IEP included preferential seating in class, repetition of direction, use of a computer, testing modifications, and copies of notes (as needed).

52. The April 6, 1998 IEP proposed a placement for the Child at the Herbert Hoover Middle School.

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[3] "An intensity of service is indicated by the number of hours a service is provided to a student with a disability. Intensities of service also establish caseloads or class size for the professionals who provide these services." COMAR 13A.05.10A(1). Intensity IV was defined at COMAR 13A.05.01.10E(5). The current regulations no longer define or refer to an "intensity of service."

53. The Herbert Hoover Middle School was the "home school" for the Child. A "home school" is the school within MCPS that a student would normally attend if the student was not a student with disabilities. The travel time from the Child's home to the Herbert Hoover Middle School would be approximately six (6) minutes.

54. At the Herbert Hoover Middle School, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students. Students would also be seen on an individual basis, as determined by the speech pathologist.

55. Under the "inclusion model" at the Herbert Hoover Middle School, the Child would be in a class of between 24-28 students in the World Studies, Science and English classes. The English class had an upper cap of 24 students and was designed for students who needed more support in writing and reading. The World Studies, Science and English classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would sit with and provide special education services to 5-6 students in the class who had IEPs. Among other services, the special education certified teacher would provide copies of notes, study guides, and, if necessary, might cue a student to focus by writing down key words from the blackboard and/or whispering in his/her ear. The Child would be one of those 5-6 students.

56. In his self-contained special education writing/ resource class at the Herbert Hoover Middle School, the

Child, as part of a group, would receive 45 minutes of reading/writing support each day from a special education teacher. The writing/resource class would have a class size between 6-8 students. All students in that class would have IEPs. The Child would also receive support for his "inclusion model" World Studies, Science and English classes in this setting, the special education teacher in that setting would help the students study for tests and assist them with their homework.

57. During the April 6, 1998 ARD Committing meeting, the Parents expressed concern over the class size proposed for the Child at the Herbert Hoover Middle School. The Parents were informed that MCPS would also be willing to provide the services specified in the April 6, 1998 IEP at the Robert Frost Middle School.

58. The travel time from the Child's home to the Robert Frost Middle School would be approximately ten (10) minutes.

59. The Parents did not sign the portion of the April 6, 1998 IEP listing the goals and objectives of the IEP. The Parents did not agree with the intensity of special education to be provided, the plan of related services, or the placement specified for the Child in the April 6, 1998, IEP. The ARD Committee meeting ended without an agreement between the Parents and MCPS on the 1998-1999 IEP for the Child and the placement for the Child.[4]

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[4] On April 9, 1998, the ARD committee sent the Parents a post-meeting letter memorializing its action with respect to the Child's IEP and offered placement.

60. At the end of the April 6, 1998 ARD Committee meeting, the Parents stated that they would have private consultants review the IEP, review the goals and objectives of the IEP, visit the schools to observe the placements offered, and then re-contact MCPS.

61. The special education and related services specified by the April 6, 1998 IEP could be provided for the Child by a placement at the Herbert Hoover Middle School or the Robert Frost Middle School.

62. After the April 6, 1998 ARD Committee meeting, the Parents did not visit the Herbert Hoover Middle School.

63. The Parents set up an appointment to observe the placement offered at the Robert Frost Middle School.

64. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at that school. When she came in, the Child's mother told Doris Shiery that she (the Child's mother) was sure the Robert Frost Middle School wouldn't be appropriate. Doris Shiery took the Child's mother on a tour of the school and discussed with her the transition process and the possible placement for the Child at the Robert Frost Middle School.

65. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child would be in self-contained special education classes of 8-12 students for both English and the writing/resource classes. Both classes would be taught by certified special education teachers. Under an "inclusion model" (similar to that at the Herbert Hoover Middle School), the Child would be one of between 28-32 students in his World Studies and

Science classes. The World Studies and Science classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would sit with and provide special education services to 4-5 students in the class who had IEPs. The Child would be one of those 4-5 students. Just as at the Herbert Hoover Middle School, the Child would be in a regular education class of up to 32 students for Math, Physical Education, and Arts Rotation.

66. The Child's mother, during her visit to the Robert Frost Middle School, had the opportunity to sit in on two "inclusion" classes such as those in which the Child would be placed. She observed the classes and the role of the special education teacher in those classes.

67. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

68. After the visit to the Robert Frost Middle School, the Parents did not re-contact MCPS and request any additional services and/or goals be added to the Child's IEP for the 1998-1999 school year.

69. On May 5, 1998, the Parents sent a letter to the MCPS advising of their intention to place the Child "at the McLean School for the 1998-199[9] school year." (MCPS Exhibit #24) The letter read:

> . . . [W]hat MCPS is proposing for [the Child] . . . would be insufficient to meet his identified needs. More specifically, [the Parents] have decided that the proposed MCPS placement is too large, not structured enough, has insufficient services and does not include required related services. . . .

70. Although MCPS obtained permission from the Parents to contact Ruth B. Spodak, Ph.D. & Associates and Carol A. Kamara, Ph.D. CCC-SP/A [sic], in order to discuss their reports, no one from MCPS did so.

71. The Child has areas of strength and severe weaknesses in his ability to communicate. The Child experiences highly significant difficulty with auditory processing skills.

72. Although individual speech/language therapy had been recommended by Carol Kamara in the report on her speech/language testing of the Child, only group therapy, 45 minutes per week was offered under the April 6, 1998 IEP.

73. The Child is highly distractible, the presence of a special education teacher sitting near the Child in class as in the "inclusion" model proposed by MCPS, is likely to add to his distraction. Because of his distractibility, the "inclusion" model as proposed by MCPS is not appropriate for the child.

74. The Child's learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child.

75. The long range goals, short term objectives, hours of special education and related services, as listed on the April 6, 1998 IEP, are not reasonably calculated to meet the Child's needs for special education and related services during the 1998-1999 school year. The IEP had no

goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem. The IEP did not meet the Child's need for individual speech and language therapy 45-60 minutes per week or, at a minimum, 30 minutes per week if he were to have an additional period of group therapy. From a speech-language perspective, the Child needs an educational setting limited to small classes with a low student to teacher ratio. The IEP fails to require that the Child receive services in small classes for all academic subjects.

76. The Intensity IV special education program offered by MCPS in the Herbert Hoover Middle School is not reasonably calculated to meet the Child's educational needs. Special education and related services provided by the proposed placement in the "inclusion" program at the Herbert Hoover Middle School would not be appropriate and would not provide significant learning for the child. That placement would not meet the requirement that the Child be in small classes in all academic subjects, would not provide individual speech/language therapy, or address the Child's underlying speech/language issues, and the Child would not be amendable to the type of help offered within the "inclusion" classes.

77. The Intensity IV special education program offered by MCPS in the Robert Frost Middle School is not reasonably calculated to meet the Child's educational needs. Special education and related services provided by the proposed placement in the "inclusion" program at the Robert Frost Middle School would not be appropriate and would not provide significant learning for the Child. That placement would not meet the requirement that the Child be in small classes in all academic subjects, would not

provide individual speech/language therapy, or address the Child's underlying speech/language issues, and the Child would not be amendable to the type of help offered within the "inclusion" classes.

78. The special education and related services called for by the April 6, 1998 IEP and the placements offered by MCPS do not provide the Child with an opportunity for a FAPE during the 1998-1999 school year.

79. The McLean School of Maryland on Potomac, Maryland) is not certified by the Maryland State Department of Education as an approved special education facility. The McLean School has a learning disability program that accepts students who do not have severe learning disabilities. If the Child were to attend the McLean School for the 1998-1999 school year, all of his academic classes would be taught by certified special education teachers in class sizes of 6-12 students.

80. Placement of the Child at the McLean School's program for the 1998-1999 school year would be an appropriate placement for his educational needs.

81. The travel time from the Child's home to the McLean School of Maryland would be approximately ten (10) minutes.

82. Because the McLean School of Maryland has a small school environment similar to that at Green Acres, where the Child attended from Pre-Kindergarten, transition to that school would be easier for him than a transition to a larger public school.

DISCUSSION

The Parents in this case contend that the Intensity IV level special education program and placement offered by MCPS at either the Herbert Hoover Middle School or the Robert Frost Middle School for the 1998-1999 school year would not meet the Child's educational needs. The Parents assert that the Child's attendance at the McLean School of Maryland was necessary for him to receive an appropriate education for the 1998-1999 school year.

MCPS maintains, however, that placement of the Child at the Herbert Hoover Middle School or the Robert Frost Middle School would have been appropriate and would have provided him with a FAPE for the school year in question, therefore, it is not their responsibility to fund a placement of the Child at the McLean School of Maryland.

In a decision issued July 9, 1998, the ALJ denied the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year. Given the lapse of time since the original decision was issued, the Parents now claim they are entitled to reimbursement for their unilateral placement of the child at the McLean School of Maryland for the 1998-1999 school year.

Pursuant to the order and opinion, issued by the Honorable Peter J. Messitte in *Brian S. et al. vs. Paul L. Vance, et al.*, Civil No. PJM 99-15, United States District Court (MD), the ALJ conducted a remand proceeding in this case. The findings of fact reached, herein, are based on a reallocation of the burden of proof from the Parents and Child to MCPS. In making these findings of fact, the ALJ reconsidered the findings of fact originally reached

from the perspective of a "snapshot" taken on July 9, 1998, and not from a retrospective perspective.[5]

In their pre-hearing written statements, both parties submitted proposed findings of fact. Insofar as the ALJ accepts those proposed findings of fact, they are incorporated into the findings of fact, herein. Proposed findings of fact not incorporated are rejected as immaterial, cumulative, or not supported by a preponderance of the credible evidence.

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[5] In this course of action, the ALJ followed the reasoning in *Fuhrmann v. East Hanover Bd. of Education*, 993 F.2d 1031 (concurring opinion) (3rd Cir. 1993).

> Actions of school systems cannot, as the [parents] and the dissent suggest, be judged exclusively in hindsight. As the Court of Appeals for the First Circuit has observed an individualized education program ("IEP") is a snapshot, not a retrospective. *Roland M. v. Concord School Committee*, 910 F.2d 983, 992 (1st Cir. 1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991). In striving for "appropriateness", an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. *Id.* at 992. Moreover, while [the child's] progress during the 1989-90 school year at the State Street School is impressive, it cannot be ascertained to what extent the behavioral oriented approach offered at the State Street school was responsible for [the child's] progress, or whether [the child's] progress was a result of his own maturation process or other factors.
>
> Addressing the issue of whether or not the 1989-90 program recommended by the East Hanover Board of Education was reasonably calculated to enable [the child] to receive educational benefits, I find that it was. The [parent's] asssertion and the dissent's conclusion to the contrary is based on [the child's] actual experiences at the State Street School which occurred after the school board's placement decision had already been made. The alchemy of "reasonable calculation" necessarily involves choices among educational policies and theories – choices which courts, relatively speaking, are poorly equipped to make. Because I do not think that the district court erred in judging the appropriateness of the school district's offer without giving significant weight to the subsequent experience of the child, I would affirm the judgment under review.

Id. at 1041.

OPPORTUNITY FOR A FAPE

The IDEA was enacted to ensure that children with disabilities are provided with a FAPE to meet their unique needs. 20 U.S.C. §§ 1400-1485 (1997). In relevant part, IDEA defines a FAPE as:

> [S]pecial education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, [and] (D) are provided in conformity with the individualized education program required under Sec. 1414(d) of this title.

Id. at § 1401(8). The educational program offered must be tailored to the particular needs of the disabled student by the development and implementation of an IEP. *Id.* at § 1414(d). That document enumerates the student's current educational performance, sets forth annual and short-term objectives for improvements in performance, and describes the specially designed instruction and services that will assist the student in meeting those objectives. *Id.* at § 1401(11).

In addition, IDEA dictates that each student with disabilities be educated in regular classrooms with non disabled children "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A) and COMAR 13A.05.01.08E(2)(b). Specifically, IDEA directs the states to establish:

> To the maximum extent appropriate, children with disabilities, including children in public or

> private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature of severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Id. at 20 U.S.C. § 1412(a)(5)(A).

The U.S. Court of Appeals, 4th Circuit recognized the significance of mainstreaming when it found:

> Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with non handicapped children is not only a laudable goal but is also a requirement of the [IDEA].

Devires v. Fairfax County School Board, 882 F.2d 876, 878 (4th Cir. 1989).

Even in light of the clear congressional preference, the *DeVires* court cautioned that mainstreaming is not appropriate for every disabled student. In issuing that warning, the *DeVires* court relied upon an analysis utilized by the U.S. Court of Appeals, 6th Circuit. That analysis is as follows:

> The proper inquiry is whether a proposed placement is appropriate under the [IDEA]. In some cases, a placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming. The perception that a segregated institution is academically superior for a handicapped child may reflect no more than a basic disagreement

> with the mainstreaming concept. Such a disagreement is not, of course, any basis for not following the [IDEA's] mandate. In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the [IDEA]. Framing the issue in this matter accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting.

Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 196 (1983).

The Supreme Court in *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 203, 102 S.Ct. 3034, 3049 (1982), interpreted IDEA's broad mandate to be satisfied when a school system provides a student with "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."

A recent case from the U.S. Court of Appeals, 3rd Circuit discusses IDEA's requisite educational benefit:

> IDEA leaves to the courts the task of interpreting "free appropriate public education." See *Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034. The Supreme Court began this task in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education. *Id.* at 192, 102 S.Ct. 3034, and confer "some educational benefit" upon the child for whom it is designed. *Id.* at 200, 102 S.Ct. 3034. In determining the quantum of educational benefit necessary to satisfy IDEA, the Court explicitly rejected a bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the potential of the particular disabled student before it. See *id.* at 202, 102 S.Ct. 3034; *see also Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985) (stating that *Rowley* holds that "no single substantive standard can describe how much educational benefit is sufficient to satisfy [IDEA]").

> We first interpreted the phrase "free appropriate public education" in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir. 1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposes a higher standard," *Id.* at 991. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988), that IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning." *Id.* at 182, and confer "meaningful benefit." *Id.* at 184. We also rejected the notion that what was "appropriate" could be reduced to

> a single standard, *id.*, holding the benefit "must be gauged in relation to the child's potential." *Id.* at 185. When students display considerable intellectual potential, IDEA requires "a great deal more than a negligible [benefit]." *Id.* at 182.
>
> As noted, the District Court held that an IEP need only provide "more than a trivial educational benefit" in order to be appropriate, equating this minimal amount of benefit with a "meaningful educational benefit." But the standard set forth in *Polk* requires "significant learning" and "meaningful benefit." The provision of merely "more than a trivial educational benefit" does not meet these standards.
>
> It appears also that the District Court may not have given adequate consideration to M.E.'s intellectual potential in arriving in its conclusion that Ridgewood's IEP was appropriate. Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable. As we have discussed, *Rowley* and *Polk* reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities.

Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 247-248 (3rd Cir. 1999).

Whether or not a student could receive the requisite educational benefit under a proposed IEP and placement is not an easy question to answer. No bright line test has been created to establish whether a student is progressing or could progress educationally. *Conklin v. Anne Arundel County Board of Education*, 946 F.2d 306, 313 (4th Cir.

1991). The task before the ALJ is to asses [sic] the evidence and to determine, in light of the Child's intellectual potential, whether it was more likely than not that the April 6, 1998 IEP and the placement(s) offered for the Child by MCPS were reasonably calculated to enable him to obtain "significant learning" and "meaning educational benefit" during the 1998-1999 school year. In the matter *sub judice*, MCPS bears the burden of persuasion in establishing that the April 6, 1998 IEP and the placement(s) offered for the Child under that IEP afforded the child an opportunity for a FAPE during the 1998-1999 school year.

In order to determine if the Child was afforded an opportunity for a FAPE, the evidence that the ALJ must assess consists – in large part – of expert opinion testimony. Expert opinion testimony is essential in order for each side to present its position on that issue.[6] There are

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[6] As recently noted by the Maryland Court of Appeals in *Wrobleski v. de Lara*, 353 Md. 509, 727 A.2d 930 (1999):

> Although expert witnesses play a vital, indeed a necessary, role in the trial of certain cases, the law, both here and in England has long viewed their procurement by, and appearance on behalf of parties to the litigation with some misgiving. As long ago as 1858, the Supreme Court noted that "opposite opinions of persons professing to be experts, may be obtained to any amount. *Winans v. New York & Erie Railroad*, 62 U.S. (21 How.) 88, 101, 16 L.Ed. 68, 71 (1858). In his 1864 treatise on Evidence, Judge Taylor observed
>
> > "Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*, and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them."

(Continued on following page)

experts on both sides who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and whether the placement(s) offered by MCPS were reasonably calculated to afford the requisite educational benefit for the Child, the reassignments of the burden of proof in this case is, again, critical to the ALJ's decision.

> JOHN P. TAYLOR A TREATISE ON THE LAW OF EVIDENCE AS ADMINISTERED IN ENGLAND AND IRELAND 4th ed. (1864), § 50 at 72 (emphasis in original).
>
> Writing in 1893, Professor Charles Himes quoted Taylor's statement and added his own view that expert witnesses "are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is in many instances the result alone of employment and the bias growing out of it." 135 J. Franklin Inst. at 409 (1893). In an 1897 address to the New Hampshire Medical Society, EXPERT TESTIMONY – PREVALENT COMPLAINTS AND PROPOSED REMEDIES, reprinted in 11 HARV L. REV. 169 (1897), Judge William Foster, though disagreeing with Professor Himes's general inference of bias, nonetheless recognized, even then that "[t]his bias or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness." *Id.* at 171.
>
> These concerns have certainly not dissipated over the years; if anything, they have increased. Wigmore noted the "distrust of the expert witness, as one whose testimony is shaped by his *bias for the party calling him.*" 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 563 at 761 (Chadbourn rev. 1979) (emphasis in original).

Id. at 515-516, 932-933.

The key fact in dispute is whether the Child experiences a "central auditory processing" problem, and if so, the impact of that disability on his ability to learn.

Carol A. Kamara, Ph.D. testified as an expert witness for the Parents. Dr. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology. Dr. Kamara testified that the Child has an unique problem with "central auditory processing," that the problem is "highly significant" and would impact the Child's learning in all academic settings. According to Dr. Kamara, to address his "central auditory processing" problem, the child's educational needs can only be met in small, self-contained special education classes. Dr. Kamara was critical of the proposed placement in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School because of the risk of simultaneous messages, distractions, and possible distortions of audio signals in that setting. Dr. Kamara further testified that this critical need of the Child – his "central auditory processing" problem – was not addressed in the April 6, 1998 IEP.

Pamala Zahara, Speech/Language Pathologist, Herbert Hoover Middle School (MCPS) testified on behalf of the MCPS. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. She indicated that, in her opinion, based on an informal assessment that she conducted, that the Child did not exhibit evidence of "severe auditory processing difficulties related to discrimination at the word level" as found by Dr. Kamara.

Dr. Kamara and Pamala Zahara strongly disagree on the usefulness of one formal test of the Child conducted during Dr. Kamara's comprehensive evaluation known as the "SCAN-A." In her opinion, Dr. Kamara relied heavily on the results of the SCAN-A. However, during cross-examination, Dr. Kamara acknowledged that no test score should be "[translated] directly into a real life situation . . . [t]hese tell us their vulnerability areas. . . . " (T. 473) In her opinion, Pamala Zahara relied heavily on her informal assessment of the Child. However, during cross-examination, Pamala Zahara acknowledged that the SCAN-A is a "formalized standardized objective measure of central auditory processing." (T. 266) However, Pamala Zahara maintains that "this particular test does not give . . . information about a student's real life listening situation." (T. 265) Pamala Zahara contends that the SCAN-A test has no relationship to the student's educational environment because the test is administered with the student using headphones and the noise (and competing messages) heard over the earphones is not typical noise that one would hear in a classroom.

Dr. Kamara is a certified audiologist. Pamala Zahra is a speech/language pathologist. Pamala Zahra is not a certified audiologist. During testimony, Pamala Zahara acknowledged that an audiologist is more qualified to diagnose auditory processing problems than a speech/language pathologist.

Dr. Kamara conducted a formal, comprehensive evaluation of the Child that took four (4) hours to complete Pamala Zahara reviewed the report from Dr. Kamara on her evaluation of the Child and conducted an informal assessment of the Child over a period of one (1) hour. Pamala Zahara found no evidence of "severe auditory processing difficulties related to discrimination at the word level" during her informal assessment and concluded, therefore, that a "central auditory processing" problem did not exist (or has only an insignificant impact on the Child's learning). Undoubtedly, Dr. Kamara's effort and experience in evaluating the Child was more extensive than that of Pamala Zahara.

In the decision issued July 9, 1998, the ALJ discussed other concerns with the merit of the expert opinion testimony from Dr. Kamara. Those concerns are still present and are incorporated into the discussion, herein, by reference.

In sum, the weight of the evidence from Dr. Kamara and Pamala Zahara on the usefulness of the SCAN-A and the existence of the Child's unique "central auditory processing" problem, rests in equipose [sic]. In resolving this dispute of fact, the ALJ must accept one expert's opinion and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinion from Dr. Zamara that the child has an unique "central auditory processing" problem and rejects Pamala Zamara's opinion to the contrary. Having reversed the factual finding on that initial point, the ALJ will further accept, the opinion of Dr. Kamara that the Child's unique "central auditory processing" problem has a significant impact on his learning and rejects expert opinion testimony from MCPS to the contrary. (Findings of Fact #16, #71, #73, & #74)

MCPS maintains that its plan of special education and related services reflected in the April 6, 1998 IEP and its proposed placement(s), offered in the alternative, were reasonably calculated to allow the child to obtain "significant learning" and "meaning educational benefit" during the 1998-1999 school year. Linda J. Brand, Special Education Teacher, Barbara J. Butera, School Psychologist, Pamala Zahra, Speech/Language Pathologist, and Doris Shiery, Special Education Teacher, were the expert witnesses who testified on behalf of MCPS on this theme.

Barbara Butera was admitted as an expert witness in school psychology. Dr. Butera's observation and psychological assessment of the Child were consistent with the assessment of the Child presented in the report on the Child from the office of Ruth B. Spodak, Ph.D & Associates. However, Dr. Butera opined that the April 6, 1998 IEP was appropriate to meet the Child's educational needs and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Butera also stated that the Child does not need a full-time, self-contained special education program.

Linda J. Brand was admitted as an expert witness in special education. She testified that the special education and related services identified by the April 6, 1998 IEP were appropriate to meet the Child's educational needs, that his IEP could be implemented at the Herbert Hoover Middle School, that his placement there was appropriate, and that the Child would obtain "educational benefit" during the 1998-1999 school year if he attended that school. (T. 133)

Doris Shiery was admitted as an expert witness in special education. She testified that the special education and related services identified by the April 6, 1998 IEP are appropriate to meet the Child's educational needs, that his IEP can be implemented at the Robert Frost Middle School, that his placement there would be appropriate, and that the Child would obtain "educational benefit" during the 1998-1999 school year if he attended that school. (T. 340-341)

Ruth B. Spodak, Ph.D., testified as an expert witness for the Parents. Dr. Spodak was admitted as an expert witness in psychology and learning disabilities. During her testimony, she opined, consistent with the opinion of Dr. Kamara, that the Child would receive only trivial or minimal educational benefit, not the appropriate benefit, in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting. Dr. Spodak believes that the Child's educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes in all academic settings are needed to minimize distractions in order for the Child to be available for learning.

MCPS special education experts testified that many of the disabled students in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School have a "profile" similar to the Child's abilities, disabilities and educational needs. MCPS special education experts testified those students with a "similar profile" are successful learning in that setting. This testimony estimates the Child's projected learning in the "inclusion model" setting compared with a group of students with whom the experts are familiar on the basis that the Child has a "similar profile." This may be a valid comparison if the Child's needs are correctly identified and properly considered in such "profiling".

However MCPS experts do not recognize that the Child has an unique central auditory processing problem that has a significant impact on his learning as described by Dr. Kamara. Resultantly, the ALJ is left to question how similar a profile the Child has to those students who are successful at the Herbert Hoover Middle School or the Robert Frost Middle School. The failure of MCPS experts to accept and take this need of the Child into their consideration is a factor in explaining the merit of their opinions.

Dr. Kamara testified that the April 6, 1998 IEP, as drafted, does not recognize the Child's central auditory processing problem as a need to be addressed in the Child's education. The April 6, 1998 IEP had no goals to address the Child's severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem, as found and described by Dr. Kamara. This testimony was not refuted. Having accepted the position that the Child has an unique central auditory processing deficit, the failure of the IEP to recognize and address that deficit is noteworthy.

According to Dr. Kamara and Dr. Spodak, the Child's learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the Child. Moreover, Dr. Spodak and Dr. Kamara insist that a class is not made small for the Child by increasing the teacher/student ratio within a large class. Given the description of the "inclusion setting" in this record, and after accepting the opinion from Dr. Kamara that the Child has an unique central auditory processing problem that has a significant impact on his learning, the ALJ now questions whether the Child could obtain meaningful educational benefit in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School.

The last class the Child attended while at Green Acres School had no more than 13 assigned students and one teacher. The Child received numerous accommodations and additional educational support in that setting. The Child was on a probation status in that educational setting. Despite the small class size accommodations, and additional educational support, the Child was not making satisfactory progress learning in that setting. With one important caveat (the Child was not taught by a certified special education teacher at Green Acres School), this does lend some support, however slight, to the Parents' experts who maintain that the Child needs small self-contained special education classes if he is to obtain significant learning.

In the decision issued July 9, 1998, the ALJ discussed other concerns with the merit of the expert opinion testimony from Dr. Spodak. Those concerns are still present and are incorporated into the discussion, herein, by reference.

In sum, the weight of the evidence from the Parents' experts and the experts on behalf of MCPS on the degree of "educational benefit" that the Child could have obtained under the April 6, 1998 IEP, in the "inclusion" setting at either the Herbert Hoover Middle School or the Robert Frost Middle School rests in equipose. In resolving this dispute, the ALJ must accept the opinion from one side's experts and reject the other. Unlike the initial hearing, MCPS now bears the burden of proof on facts in dispute. For this reason, the ALJ now accepts the opinions from Dr. Kamara and Dr. Spodak that the Child – given his potential for learning – would not have obtained meaningful educational benefit under the April 6, 1998 IEP in a placement at either the Herbert Hoover Middle School or the Robert Frost Middle School.

Given the findings of fact, herein, MCPS has failed to persuade the ALJ that the April 6, 1998 IEP was reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were appropriate to provide for the Child's educational needs in accordance with the IDEA.

REIMBURSEMENT

In cases where a public education agency has not offered a FAPE and the parents have placed their child in a private program that does provide an appropriate education, the parents are entitled to be reimbursed by the public education agency for the placement. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985). The unilateral placement need not be in a program approved by the State. And, while the private school must offer an appropriate education, it is not required to follow all of IDEA's procedural requirements or meet all state special education standards. *Carter v. Florence County School District*, 950 F.2d 156 (4th Cir. 1991), *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993). As discussed above, an ALJ may "order school authorities to reimburse parents for their expenditures on private special education for a child if [the ALJ] ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Florence*, 510 U.S. at 14, 114 S.Ct. at 364 (quoting *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 369, 105 S.Ct. 1996, 2002 (1985)). Such reimbursement is appropriate, however, only to the extent that the cost of the private education was reasonable. *Id.* at 17 at 366.

The April 6, 1998 IEP and placement(s) offered by MCPS failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year. After the evidentiary record in this case was closed, the Parents placed the child at the McLean School of Maryland for the 1998-1999 school year. The record reflects that the McLean School of Maryland would provide the child with small classes taught by special educators for all of his academic subjects. It offers a setting and program appropriate to his needs. The McLean School of Maryland provides the Child with an appropriate educational opportunity for the 1998-1999 school year that he would not otherwise receive from MCPS.

However, reimbursement is an equitable form of relief. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993). MCPS argues that it was never the intention on part of the Parents to have the Child enroll as one of its students, and since it put forth a good faith effort to develop an IEP for the 1998-1999 school year, equity requires that the Parents be denied reimbursement. MCPS relies on, among other authorities, *Tucker [illegible] Tucker v. Calloway County Board of Education*, 136 F.3d 495 (6th Cir. 1998) and *Sanger v. Montgomery County Board of Education*, 916 F. Supp. 518 (D. Md. 1996). *Tucker* and *Sanger* are cases in which reimbursement to parents for the unilateral placement of a student with disabilities in a private school was denied. In both cases cited, the parents enrolled the student with disabilities in a private school setting before an IEP could be developed by the local education agency. The holdings in those cases reflect that no financial assistance is warranted for the private placement, where a lack of intention by parents to avail themselves of a public school education for their student with disabilities, no matter what program was developed nor how appropriate it was to respond to the student's needs, is revealed.

The Child had been educated from pre-kindergarten through seven as a student at the Green Acres School, a private school. The Child's mother had worked for three years as an administrator at that school, as the assistant to the head of the Green Acres School. On November 7, 1997, the Child's mother contacted MCPS in order to have the Child identified as a student with disabilities under IDEA. On that date, the Child's mother indicated to a MCPS teacher that she had to find another *private* school for the Child to attend. During December 1997, the Parents were in contact with the McLean School of Maryland and another private school. On December 30, 1997, the child, through his Parents, applied for admission to the McLean School of Maryland. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. The Parents had also applied to the Lab School for admission of the Child as a student for the 1998-1999 school year and that application was also accepted. On March 13, 1998, MCPS sent notice of the second ARD committee meeting to the Parents. By March 16, 1999, the Parents had paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee placement of the child at the school for the 1998-1999 school year. At the time the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland, the Parents knew that the ARD committee meeting that was to prepare an IEP and determine a placement for the Child for the 1998-1999 school year had not yet taken place. The Parents and their attorney attended the April 6, 1998 ARD Committee meeting.

Before the April 6, 1998 ARD Committee meeting, the Parents had already enrolled the Child at the McLean School of Maryland for the 1998-1999 school year. At the April 6, 1998 ARD Committee meeting, the Parents indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered, and then recontact MCPS. The Parents did not visit the Herbert Hoover Middle School. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at the school. When she came in, the Child's mother told Doris Shiery that she (the Child's mother) was sure the Robert Frost Middle School wouldn't be appropriate. The Parents did not recontact MCS and request any additional services and or goals be added to the Child's IEP for the 1998-1999 school year.

These events strongly suggests a design by the Parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend private school. The Child's mother testified that as of March 16, 1998, "there was a chance" that the Child would end up attending public school for the 1998-1999 school year. (T. 570) Despite the testimony, the ALJ believes it more likely than not that the child would be attending the McLean

School of Maryland for the upcoming school year no matter what IEP was developed and public school placement was offered at the April 6, 1998 ARD Committee meeting. The Parents did not approach their interaction with MCPS as a partnership in educating the Child as a student with disabilities. The Parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind that statute.[7]

The Parents contend that they are seeking only what they are entitled to under the IDEA. Under IDEA, the parents and the local education agency should be equal partners in educating a student with disabilities. As a matter of equity, therefore, the ALJ will create a partnership between the Parents and MCPS for funding placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

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[7] The conduct of MCPS experts also leaves much to be desired. MSPC experts failed to develop an IEP that was reasonably calculated to provide the Child with "significant learning" and "meaning educational benefit." The Parents' experts had evaluated the Child and provided reports of those evaluations. Those reports were provided to MCPS. The independent assessments of the Child were extensively reviewed and considered by MCPS experts. An MCPS expert accepted the independent psycho-educational evaluation of the Child but rejected the educational setting recommended. An MCPS expert accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended. MCPS experts made no effort to contact the Parents' experts and discuss those reports and recommendations. Lack of contact by MCPS experts with the Parents experts may have played a role in the failure by MCPS to develop an IEP appropriate to the Child's educational needs and offer an appropriate placement.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the April 6, 1998 IEP was not reasonably calculated to provide "significant learning" and "meaning educational benefit" and the placement(s) offered by MCPS were not appropriate and failed to afford the Child an opportunity for a FAPE for the 1998-1999 school year as required by IDEA, 20 U.S.C. § 1400(c) (1997); Md. Code. Ann., Educ. § 8-413 (1997).

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the Parents are entitled to reimbursement for one half of the Child's unilateral placement at the McLean School of Maryland during the 1998-1999 school year. *School Committee of the Town of Burlington, Massachusetts v. Department of Education of Massachusetts*, 471 U.S. 359, 105 S.Ct. 1996 (1985) *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361 (1993).

ORDER

IT IS ORDERED THEREFORE, that the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year be, and hereby is, GRANTED; and

IT IS FURTHER ORDERED, that the Parents shall be REIMBURSED by MCPS for one half of the cost of placement of the Child at the McLean School of Maryland for the 1998-1999 school year.

November 27, 2000 /s/ S. J. Nichol
Date
Stephen J. Nichols
Administrative Law Judge

APPEAL RIGHTS

Any party aggrieved by this Final Decision of the Maryland State Department of Education may appeal it by filing a petition for judicial review with the circuit court for the county where the child resides or the United States District Court for Maryland, without regard to the amount in controversy, within one hundred eighty (180) days after the date that notice of the decision is sent Md. Code. Ann. [Illegible], 1999).

APPENDIX

The following documents were admitted on behalf of MCPS:

MCPS = 1 – Parent Interview Questionnaire.

MCPS = 2 – Educational history with attachments.

MCPS = 3 – Speech/Language Assessment, dated December 9, 1997.

MCPS = 4 – Secondary teacher referral/reports.

MCPS = 5 – Classroom observation, dated December 17, 1997.

MCPS = 6 – Correspondence to David Cross from Holly Parker, dated December 24, 1997.

MCPS = 7 – Psycho-Educational evaluation, dated January 1998.

MCPS = 8 – Correspondence to Parents from Mary Lee Phelps, dated January 7, 1998.

MCPS = 9 – Correspondence to Parents from Caroline Kursman, dated January 14, 1998.

MCPS = 10 – Correspondence to Caroline Kursman from Holly Parker, dated February 17, 1998.

MCPS = 11 – Special needs consultation, dated February 19, 1998.

MCPS = 12 – Classroom observation, dated February 19, 1998.

MCPS = 13 – Green Acres School record summary.

MCPS = 14 – Student screening profile worksheet.

MCPS = 15 – Correspondence with attachments to Parent from Caroline Kursman, dated February 26, 1998.

MCPS = 16 – Correspondence to Linda Brand from Holly Parker, dated March 5, 1998.

MCPS = 17 – Psychological evaluation review, dated March 12, 1998.

MCPS = 18 – Correspondence to Parents from Caroline Kursman, dated March 13, 1998.

MCPS = 19 – Correspondence to Caroline Kursman from Holly Parker, dated March 13, 1998.

MCPS = 20 – Speech language assessment review, dated March 13, 1998.

MCPS = 21 – Educational assessment report review, dated March 15, 1998.

MCPS = 22 – Occupational therapy evaluation, dated March 18, 1998.

MCPS = 23 – Correspondence to Parents from Caroline Kursman, dated April 9, 1998, with attached 1998-99 IEP.

MCPS = 24 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

MCPS = 25 – Request for due process hearing, dated May 26, 1998.

MCPS = 26 – Correspondence to Holly Parker from Zvi Greismann, dated May 28, 1998.

MCPS = 27 – Brand chronology.

MCPS = 28 – Thayer chronology.

MCPS = 29 – Subpoena Duces Tecum to the Custodian of Records of the McLean School.

MCPS = 30 – Application for admission to the McLean School, dated December 30, 1997.

MCPS = 31 – Progress report from the Green Acres School, dated June 1998.

MCPS = 32 – Authorization of release of confidential information, dated December 19, 1997.

MCPS = 33 – Letter of acceptance from The McLean School, dated March 1,1998.

The following documents were admitted on behalf of the Parents:

Parent = 1 – Request from mediation due process hearing, dated May 26, 1998.

Parent = 2 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

Parent = 3 – Special needs consultation, dated February 19, 1998.

Parent = 4 – Psycho-Educational evaluation, dated January 1998.

Parent = 5 – Speech/language assessment, dated December 9, 1997.

Parent = 6 – Report cards for grades 6th and 7th.

Parent = 7 – Correspondence and progress report to Parents from Green Acres School sixth grade team, dated May 27, 1997.

Parent = 8 – Neuropsychological evaluation, dated January 24 & 26, 1995.

Parent = 9 – Psychological evaluation, dated August 24, 1991.

Parent = 10 – Speech/language progress evaluation report, dated September & October 1990.

Parent = 11 – Speech/language re-evaluation, dated March 15, 1989.

Parent = 12 – Speech/language evaluation, dated August 5, 1998.

Parent = 13 – Occupational therapy evaluation, dated August 4, 1988.

Parent = 14 – Speech/language therapy progress report, dated August 1988.

Parent = 15 – Speech/language therapy progress report, dated June 22, 1997.

Parent = 16 – Correspondence to Parents from Nan Shapiro, dated May 5, 1998.

Parent = 17 – Comprehensive testing program report.

Parent = 18 – Review of assessment, dated March 1998.

Parent = 19 – List of SLP issues.

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS, JOCELYN AND MARTIN SCHAFFER, AND AS HIS NEXT FRIEND	* BEFORE STEPHEN J. * NICHOLS ADMINIS- * TRATIVE LAW JUDGE * OF THE MARYLAND * OFFICE OF ADMINIS- * TRATIVE HEARINGS
VS.	* #98-MSDE-MONT-OT- * 016662
MONTGOMERY COUNTY	*
PUBLIC SCHOOLS	*

* *

DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
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STATEMENT OF THE CASE

This case arises from a request by Jocelyn S. Schaffer and Martin P . Schaffer ("Parents"), the mother and father, respectively, of Brian Schaffer ("Child"), for a hearing to review the provision of a free appropriate public education ("FAPE") for the Child as a student with disabilities. The local education agency responsible for providing the Child a FAPE is the Montgomery

County Public Schools ("MCPS"). On May 26, 2998, the Parents filed this request with the MCPS.[1]

Pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(c) (1997), 34 C.F.R. § 300.510 (1996), Md. Code Ann., Educ. § 8-413 (1997), and the Maryland State Department of Education Guidelines for Maryland Special Education Mediation/Due Process Hearings, the above-captioned case was heard over a period of three days (June 16, 1998, June 23, 1998, & July 2, 1998) before Stephen J. Nichols, Administrative Law Judge ("ALJ"), Office of Administrative Hearings ("OAH"). The hearing was conducted at the offices of the MCPS, 850 Hungerford Drive, Rockville, Maryland. The record closed on July 2, 1998.[2]

Michael J. Eig, Esquire, Bogin and Eig, P.C., represented the Parents and the Child. Edmund W. Law, Esquire, represented the MCPS.

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[1] In pertinent part, the Request For Due Process Hearing reads:

"[The Child] is a student in Montgomery County, Maryland. At issue is whether the placement recommended by MCPS for the 1998-1999 school year at Hoover Middle School is appropriate, and if not, whether the placement at the McLean School is appropriate. Parents have duly notified MCPS of their intention to enroll [the Child] at the McLean School and have informed them of their disagreement with the proposed program. The placement at Hoover is too large, not structured enough, has insufficient services and does not include required related services. Additionally, we are in disagreement with the [i]ntensity of service proposed and do not believe it complies with COMAR requirements. The IEP is also at issue as we do not believe MCPS has identified [the Child's] complete disability and have not signed the IEP. . . . "

[2] A letter (facsimile and original) dated July 6, 1998, was subsequently received at the OAH from the representative for MCPS. That letter, with attachments, is not part of the record, herein, and was not considered in entering the instant decision.

Procedure in this case is governed by the "contested cases" provisions of the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1995 & Supp. 1997) and the Rules of Procedure of the Office of Administrative Hearings, Code of Maryland Regulations ("COMAR") 28.02.01.

ISSUES

Whether the Individual Education Program ("IEP") prepared for the Child by the MCPS, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-1999 school year.[2]

Whether placement of the Child at the McLean School of Maryland would provide the Child with a FAPE in the least restrictive environment ("LRE") possible for the 1998-1999 school year.[3]

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[2] An IEP is a "blueprint" for assisting a student with special education needs. Its development requires evaluation of the disabled student's present level of performance and his unique needs for special education and any related services. The IEP is to be reviewed annually by school officials and the student's parents or guardians and revised as needed. 20 U.S.C. § 1414(d) (1997).

[3] COMAR 13A.05.01.02B(3) provides:

(3) "Least restrictive environment" means that:

(a) To the maximum extent appropriate, students with disabilities, including students in public and private institutions or other care facilities, are educated with students who are not disabled; and

(b) Special classes, separate schooling, or other removal of students with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

SUMMARY OF THE EVIDENCE

EXHIBITS:

MCPS submitted thirty-three (33) documents which were admitted into the record as exhibits. The Parents submitted nineteen (19) documents which were admitted into the record as exhibits. The parties stipulated to the admission of the majority of each others exhibits. Many of the exhibits admitted on behalf of each party are duplicated in the exhibits of the opposing party. A complete list of the exhibits that were admitted is found in the appendix to this decision.

WITNESSES:

Caroline MacNichol, Custodian of Records, McLean School of Maryland; Linda J. Brand, Special Education Teacher, Herbert Hoover Middle School, MCPS; Barbara J. Butera, School Psychologist, MCPS; Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School, MCPS; Doris Shiery, Special Education Teacher, Robert Frost Middle School, MCPS; and Vickie Strange-Moscoso, Special Education Supervisor, MCPS, testified on behalf of the local education agency.

Linda J. Brand was admitted as an expert witness in special education. Barbara J. Butera was admitted as an expert witness in school psychology. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. Doris Shiery was admitted as an expert witness in special education.

Ruth B. Spodak, Ph.D., Ruth B. Spodak, Ph.D., & Associates; Carol A. Kamara, Ph.D, CCC-SLP/A, The Kamara Center; Nancy Shapiro, Head of the Middle

School, Green Acres School; and the Child's mother testified on behalf of the Parents and the Child.

Ruth B. Spodak was admitted as an expert witness in psychology and learning disabilities. Carol A. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology.

FINDINGS OF FACT

1. The Child's date of birth was May 13, 1984.

2. The Child has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") and has been receiving medication for this diagnosis. Since Spring 1997, the Child has been taking Wellbutrin.

3. The Child has attended Green Acres School since pre-kindergarten. The Green Acres School is not part of the MCPS. The Green Acres School is a private school. While at Green Acres School, the Child was not identified as a student with disabilities. The Green Acres School does not have a special education program. The travel time from the Child's home to the Green Acres School is approximately ten (10) minutes.

4. While attending the 5th Grade and the 6th Grade at the Green Acres School, the Child demonstrated difficulty with productivity and quality of classwork.

5. Because of his prior academic performance, during the 1997-1998 school year, the Child attended the Green Acres School at the part of its 7th Grade class on a probationary status.

6. During the 1997-1998 school year, the Child was in a regular education class with a student to teacher ratio of 13:1. The Child experienced difficulty with writing and reading tasks. Classwork productivity was a significant problem. The Child had difficulty staying on task.

7. During October 1997, at a meeting with Green Acres School staff personnel, the Child's mother was told that the Child needed a placement, for the next school year, in a school designed to address his learning difficulties.

8. During the 1997-1998 school year, the Child was receiving instructional, classroom and testing accommodations because of his learning difficulties. Accommodations for the Child at the Green Acres School included individual attention from classroom teachers, a peer buddy to ask for clarification of direction, priority seating, working with a tutor 3 times per week, reading support, extra time on class assignments and standardized tests, tutor rewriting of essay questions on his tests to multiple choice or short answer, and exclusion of Spanish class from his educational program.

9. During the 1997-1998 school year, the Child's teachers/tutor at the Green Acres School did not include a person qualified as a special education teacher.

10. At the Green Acres School, the Child received a passing grade in all his subjects for the third trimester of the 1997-1998 school year.

11. The Herbert Hoover Middle School is part of the MCPS system.

12. On November 7, 1997, the Child's mother telephoned the Herbert Hoover Middle School and spoke with Linda Brand, a MCPS special education teacher. The Child's mother indicated she wanted the Child assessed

for identification as a student with disabilities. During this phone conversation, the Child's mother stated that she had to find another private school for the Child to attend.

13. On November 11, 1997, the Child's mother contacted the office of Carol A. Kamara, Ph.D, CCC-SLP/A, an independent speech language pathologist/audiologist, for the purpose of arranging for a communication assessment of the Child.

14. On December 9, 1997, Carol A. Kamara conducted a comprehensive speech and language assessment of the Child employing a variety of formal and informal measurements. The assessment took 3-4 hours.

15. After the December 9, 1997 assessment, Carol A. Kamara produced a written report. The written report reads, "[the Child's] auditory processing of words was so severely impaired by discrimination issues that his ability to execute any auditory tasks should be considered possibly compromised by this one feature." The written report also reads, that the Child's oral motor evaluation "pattern suggested some "articulation dyspraxia". . . . The report recommends, "[the Child's] serious needs in reading, writing, spelling, and probably math, indicate that he should be placed in a self-contained, full-day special education program. (MCPS Exhibit #3)

16. On December 19, 1997, the Child's mother provided the Green Acres School with an "Authorization for Release Of Confidential Information" in order that the Child's academic records could be sent to the McLean School. The McLean School of Maryland is a private school. (MCPS Exhibit #32)

17. On December 30, 1997, the Parents submitted an application for admission of the Child as a student in the 8th Grade at the McLean School of Maryland for the 1998-1999 school year.

18. During December 1997, the Parents met with Ruth B. Spodak, Ph.D., a psychologist, at the offices of Ruth B. Spodak, Ph.D. & Associates, for the purpose of arranging for an independent psycho-educational evaluation of the Child.

19. On January 5, 1998 and January 6, 1998, Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted a psycho-educational evaluation of the Child at the offices of Ruth B. Spodak, Ph.D. & Associates. The evaluation included a review of records, information obtained from the Parents, formal testing, and behavioral observations of the Child.

20. After the evaluation of the Child, Ruth E. Spodak, Diane Toby, and Deanna Greenstein produced a written report. The report discussed the social/emotional functioning, potential for academic achievement, and cognitive abilities of the Child. The report indicated that the Child was bright and intelligent. The report indicated that because of the Child's learning difficulties, his cognitive test results (in the average range of intelligence) underestimated his true abilities. An excerpt from the report reads, "[the Child] will do best in a small, structured setting, where expectations are clear and consistent." (MCPS Exhibit #7)

21. On January 14, 1998, MCPS sent a letter to the Parents advising that a "screening [Admission, Review, and Dismissal ("ARD") committee] meeting" had been scheduled by MCPS at the Herbert Hoover Middle School

on January 29, 1998. The purpose of this meeting was, "to discuss [the Child's] educational needs, determine whether an educational disability is suspected, and determine follow-up assessment as needed." (MCPS Exhibit #9)

22. The ARD committee meeting scheduled for January 29, 1998, was rescheduled at the request of the Parents. The attorney for the Parents had a schedule conflict on January 29, 1998.

23. On February 26, 1998, a meeting of the ARD committee at the Herbert Hoover Middle School was held. Those attending the meeting included, among others, the Parents; an attorney for MCPS; Caroline Kursman, Principal, Herbert Hoover Middle School; Jeff Hill, Assistant Principal, Herbert Hoover Middle School; Linda Brand, special education teacher, Herbert Hoover Middle School; Nancy Shapiro, Head of the Middle School, the Green Acres School; Barbara Butera, School Psychologist, MCPS; and Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School.

24. The Parents fully participated in the ARD committee meeting held on February 26, 1998.

25. Test results, teach referrals, observation reports, a parent questionnaire, and educational records of the Child were reviewed by the ARD committee before the February 26, 1998 meeting. These documents included, but were not limited to, an observation report from Nancy Shapiro, Head, Middle School, the Green Acres School; a report from Charla Levine, Special Needs Consultant, the Green Acres School; Narrative Report Cards on the Child from the Green Acres School; an observation report of the Child at the Green Acres School from Linda Brand; and reports of private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A).

26. At the February 26, 1998 ARD committee meeting, the educational history of the Child was discussed. As a result of the meeting, the ARD committee "[suspected] [the Child] may have a [speech-language] disability, and/or learning disability in [areas] of reading [and/or] writing." (MCPS Exhibit #15)

27. The ARD committee decided to further review the private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A) that were provided to the committee, to conduct informal assessments of the Child, and to reconvene to evaluate the Child's needs in conjunction with all data.

28. At the end of the February 26, 1998 ARD committee meeting, the Parents were told that the next meeting of the ARD would be an evaluation meeting to determine if the Child met the criteria for special education services as a student with a disability.

29. At the end of the February 26, 1998 ARD committee meeting, MCPS obtained permission from the Parents to conduct its own assessments of the Child, to contact Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A (in order to discuss their reports), and to contact the child's teachers and tutor at the Green Acres School (to gain information on the Child).

30. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. By March 16, 1998, the Parents had paid a non-refundable $750.00 enrollment fee to the

McLean School of Maryland to guarantee placement of the Child at the school for the 1998-1999 school year.

31. Select MCPS members of the February 26, 1998 ARD committee were assigned to review the private assessments of the Child from the perspective of their expertise, conduct further informal assessments of the Child as indicated, and to make a report to the next ARD committee meeting.

32. Linda Brand reviewed the reports of the private assessments of the Child (from Ruth B. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A).

33. On March 12, 1998, Linda Brand met with the child at the Herbert Hoover Middle School. During this meeting, Linda Brand administered the Reading Comprehension test of the Wechsler Individual Test of Achievement and the Qualitative Reading Inventory to the Child and conducted an informal assessment of the Child's needs for special education services.

34. Linda J. Brand prepared goals and objectives for the Child's IEP that incorporated the needs, from the special education perspective, identified in the reports of the assessments of the Child from Ruth E. Spodak, Ph.D., and Carol A. Kamara, Ph.D, CCC-SLP/A.

35. Pamala Zahra reviewed the report of the private assessment of the Child conducted by Carol A. Kamara, Ph.D, CCC-SLP/A.

36. On March 12, 1998, Pamala Zahra met with the Child at the Herbert Hoover Middle School and conducted an informal assessment of the Child over a period of one hour. This informal assessment included, among other activities, several tasks designed to informally assess the Child's phonological processing skills and the administration of one subtest, Understanding Ambiguous Sentences, from the Test of Language Competence.

37. Pamala Zahra disagreed with some of the Child's needs identified in the report of the assessment conducted by Carol A. Kamara. Pamala Zahra did not agree that the Child had "severe auditory processing difficulties related to discrimination at the word level," and "articulation dyspraxia." (MCPS Exhibit #20)

38. Pamala Zahra prepared goals and objectives for the Child's IEP that incorporated the needs, from the speech-language perspective, identified in the report of the assessment from Carol A. Kamara, with which she had agreed.

39. Barbara Butera reviewed the report of the psycho-educational evaluation of the Child from Ruth B. Spodak, Ph.D.

40. On March 12, 1998, Barbara Butera met with the child at the Herbert Hoover Middle School. During this meeting, Barbara Butera interviewed the Child, administered the Behavior Assessment System for Children (BASC) to the Child, and observed the Child's interaction with Linda Brand and Pamala Zahra.

41. Barbara Butera's observation and psychological assessment of the Child on March 12, 1998, was consistent with the assessment of the Child presented in the report on the Child from Ruth B. Spodak, Ph.D.

42. On March 13, 1998, MCPS sent a letter to the Parents advising that an ARD meeting had been scheduled by MCPS for March 26, 1998. The notice also offered an alternate date of April 6, 1998, for the meeting. The

purpose of this meeting was, "to determine the answers to the following questions:" (MCPS Exhibit #18)

> 1. Does the assessment indicate the presence of a disability?
>
> 2. Is [the Child] educationally disabled? . . .
>
> 3. If there is an educational disability, what are the goals and objectives for the Child's [IEP]?
>
> 4. What amount of special education and related service is necessary to meet [the Child's] goals and objectives in the least restrictive environment (LRE)?
>
> 5. What is the appropriate placement to meet the identified goals and objectives?

43. On April 6, 1998, the MCPS held a second ARD committee meeting on the Child. Those attending the meeting included, among others, the Parents, an attorney for the Parents, an attorney for MCPS, Caroline Kursman, Jeff Hill, Linda Brand, Barbara Butera, and Pamala Zahra.

44. The April 6, 1998 ARD committee received and considered reports provided by Linda Brand, Barbara Butera, and Pamala Zahra on the Child (and on the private assessments of the Child from Carol A. Kamara, Ph.D., CCC-SLP/A, and Ruth B. Spodak, Ph.D.).

45. The Parents fully participated in the ARD committee meeting held on April 6, 1998.

46. At the April 6, 1998 meeting, the ARD Committee reviewed available information, discussed the Child's need for special education and related services, and drafted an IEP for the Child for the 1998-1999 school year.

47. On April 6, 1998, the ARD Committee identified the Child as a student with a speech-language disability and a learning disability.

48. The April 6, 1998 IEP specified an Intensity IV special education program for the Child with 15.3 hours of special education and .75 hours (45 minutes) of speech-language therapy as a related service each week.[4] The special education services would be provided in an "inclusion model" setting during the Child's World Studies, Science and English classes. The Child was to be in a regular education class for Math, Physical Education, and Arts Rotation. The Child was also to receive one period (45 minutes) of reading/writing support each day in a self-contained special education writing/resource class in lieu of the requirement of a class in foreign language.[5]

49. Supplementary aids and services specified in the Child's April 6, 1998 IEP included preferential seating in class, repetition of direction, use of a computer, testing modifications, and copies of notes (as needed).

50. The April 6, 1998 IEP proposed a placement for the Child at the Herbert Hoover Middle School.

51. The Herbert Hoover Middle School was the "home school" for the Child. A "home school" is the school

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[4] "An intensity of service is indicated by the number of hours a service is provided to a student with a disability. Intensities of service also establish caseloads or class size for the professionals who provide these services." COMAR 13A.05.01.10A(1). Intensity IV is defined at COMAR 13A.05.01.10E(5).

[5] On April 9, 1998, the ARD committee sent the Parents a post-meeting letter memorializing its action with respect to the Child's IEP and offered placement.

within MCPS that a student would normally attend if the student was not a student with disabilities. The travel time from the Child's home to the Herbert Hoover Middle School would be approximately six (6) minutes.

52. At the Herbert Hoover Middle School, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

53. Under the "inclusion model" at the Herbert Hoover Middle School, the Child would be in a class of between 24-28 students in his World Studies, Science and English classes. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would focus on and provide special education services to 5-6 students in the class who had IEPs. The Child would be one of those 5-6 students.

54. In his self-contained special education writing/resource class at the Herbert Hoover Middle School, the Child would receive 45 minutes of intensive reading/writing support each day from a special education teacher. The Child would also receive study support for his other academic classes in this setting. The writing/resource class would have a class size between 6-8 students. All students in that class would have IEPs.

55. During the April 6, 1998 ARD Committee meeting, the Parents expressed concern over the class size proposed for the Child at the Herbert Hoover Middle School. The Parents were informed that MCPS would be willing to provide the services specified in the April 6, 1998 IEP at the Robert Frost Middle School where there were smaller self-contained special education classes.

56. The travel time from the Child's home to the Robert Frost Middle School would be approximately ten (10) minutes.

57. The Parents did not sign the portion of the April 6, 1998 IEP listing the goals and objectives of the IEP. The Parents did not agree with the intensity of special education to be provided, the plan of related services, or the placement specified for the Child in the April 6, 1998 IEP. The ARD Committee meeting ended without an agreement between the Parents and MCPS on the 1998-1999 IEP for the Child and the placement for the Child.

58. At the end of the April 6, 1998 ARD Committee meeting, the Parents stated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to observe the placements offered, and then re-contract MCPS.

59. The Parents did not visit the Herbert Hoover Middle School.

60. The Parents set up an appointment to observe the placement offered at the Robert Frost Middle School.

61. On May 1, 1998, the Child's mother visited the Robert Frost Middle School and met with Doris Shiery, a special education teacher at that school. Doris Shiery took the Child's mother on a tour of the school and discussed with her the transition process and the possible placement for the Child at the Robert Frost Middle School.

62. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, special

education services would be provided for the Child in his World Studies and Science classes under an "inclusion model." The World Studies and Science classes that the Child would attend would have a class size of between 28-30 students. Those classes would be co-taught by a certified special education teacher and another teacher (not certified as a special education teacher). The special education certified teacher would focus on and provide special education services to 4 students in the class who had IEPs. The Child would be one of those 4 students.

63. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child's English and writing/resource classes would both be taught in a self-contained special education environment. The class size would be between 8-12 students. All students would have IEPs. Both classes would be taught by certified special education teachers.

64. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the Child would be in a regular education class for Math, Physical Education, and Arts Rotation.

65. If the Child was to attend the Robert Frost Middle School for the 1998-1999 school year, the .75 hours (45 minutes) of speech-language therapy each week would be provided to the Child in a small group setting. In this small group setting, a speech-language therapist would provide services to a group of 2-5 students.

66. On May 5, 1998, the Parents sent a letter to the MCPS advising of their intention to place the Child "at the McLean School for the 1998-199[9] school year." (MCPS Exhibit #24) The letter read:

> . . . [W]hat MCPS is proposing for [the Child] . . . would be insufficient to meet his identified needs. More specifically, [the Parents] have decided that the proposed MCPS placement is too large, not structured enough, has insufficient services and does not include required related services. . . .

67. The McLean School of Maryland (in Potomac, Maryland) is not certified by the Maryland State Department of Education as an approved special education facility. The McLean School has a learning disability program that accepts students who do not have severe learning disabilities. If the Child were to attend the McLean School for the 1998-1999 school year, his classes would be taught by certified special education teachers in class sizes of 6-12 students.

68. The Child has areas of strengths and weaknesses in his ability to communicate. The Child experiences moderate difficulty with auditory processing skills. Overall, the Child has a mild speech-language disability.

69. The long range goals, short term objectives, hours of special education and related services, as listed on the April 6, 1998 IEP, are reasonably calculated to meet the Child's needs for special education and related services during the 1998-1999 school year.

70. The Child's educational needs have been reasonably calculated to be met by an intensity IV special education program as defined in COMAR 13A.05.01.10E(5).

71. Special education and related services specified by the April 6, 1998 IEP can be provided by a placement for the Child at the Herbert Hoover Middle School.

72. In addition to offering a placement for the Child at the Herbert Hoover Middle School during the 1998-1999 school year, MCPS offered a placement for the Child at the Robert Frost Middle School.

73. Special education and related services specified by the April 6, 1998 IEP can be provided by a placement for the Child at the Robert Frost Middle School.

74. The special education and related services called for by the April 6, 1998 IEP and the placements offered by MCPS would provide the Child with an opportunity for a FAPE during the 1998-1999 school year.

75. The travel time from the Child's home to the McLean School of Maryland would be approximately fifteen (15) minutes.

DISCUSSION

The purpose of the IDEA is to assure that all children with disabilities have available to them a free appropriate public education designed to meet their unique needs. 20 U.S.C. § 1400(c) (1997). The IDEA provides federal assistance to state and local agencies in the education of children with disabilities. As a condition of such assistance, the recipient agencies must have "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. § 1412(a)(1) (1997).

"Appropriate" in the context of a FAPE has been interpreted to mean personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The IDEA only requires that the child be able to benefit from instruction that he receives, not that he is able to maximize his potential or that he receive optimal services. *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 3048 (1982); *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990).

In *Rowley, supra*, the Supreme Court set forth the standards a local education agency must meet in order to satisfy its obligation to provide a FAPE to a student with disabilities. The Supreme Court said the first inquiry is whether a school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the IEP developed through the IDEA's procedures and the resulting placement was reasonably calculated to enable a student with disabilities to receive appropriate educational benefit.

The Parents in this case believe that the Intensity IV level special education program and the placement offered by MCPS at the Herbert Hoover Middle School or the Robert Frost Middle School will not meet the Child's educational needs for the 1998-1999 school year. The Parents assert that the Child's attendance at the McLean School of Maryland will be necessary for him to receive an appropriate education for the 1998-1999 school year.

MCPS contends, however, that placement of the Child at the Herbert Hoover Middle School or the Robert Frost Middle School would be appropriate and would provide him with significant, measurable educational benefit; therefore, it is not their responsibility to fund a placement for the Child at the McLean School of Maryland. The ALJ finds MCPS's argument persuasive based upon the following analysis.

PROCEDURAL ANALYSIS

The development of an IEP triggers "extensive due process requirements" imposed by the IDEA and when a local education agency fails to comply with required procedures, "serious procedural noncompliance can by itself support a finding that the child has not been provided with a free appropriate public education." *Ball v. Vance City Bd. of Education*, 774 F.2d 629, 634 (4th Cir. 1985). However, *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990) held that a student is not denied a FAPE unless the procedural violations are serious and cause a loss of "educational opportunity." In its most recent case to address this issue, the U.S. Court of Appeals for the Fourth Circuit held that:

> [T]o the extent that the procedural violations did not actually interfere with the provision of a free appropriate public education, these violations are not sufficient to support a finding that an agency failed to provide a free appropriate public education.

Gadsby v. Grasmick, 109 F.3d 940, 956 (4th Cir. 1997).

The Parents have not argued that the Child's procedural rights were violated under the IDEA.

The record has not revealed any violation of procedural safeguards that actually interfered with the opportunity of the Child for a FAPE for the 1998-1999 school year.

The ALJ believes that the identification of the Child by MCPS as a student with disabilities, the development of the April 6, 1998 IEP, and the placement(s) offered for the Child for the 1998-1999 school year are consistent with the due process requirements imposed by the IDEA.

EDUCATIONAL BENEFIT ANALYSIS

The U.S. Supreme Court discussed the FAPE concept in *Board of Educ. of the Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. at 198, 102 S.Ct. at 3046 (1982):

> We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." . . .

The Court continued:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend million of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive service . . . as may be required to assist the handicapped child to *benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by [the IDEA]

> consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id., 458 U. S. at 200-01, 102 S.Ct. at 3048.

In juxtaposition to requirements for individualized instruction, the IDEA also mandates that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). Such inclusion is required by State and federal regulations which have been promulgated to implement the requirements of the IDEA. 34 C.F.R. § 300.550-300.556; COMAR 13A.05.01.02B(3)(a).

"Mainstreaming of handicapped children into regular school programs where they might have opportunities to study and to socialize with nonhandicapped children is not only a laudable goal but is also a requirement of [the IDEA]." *DeVries v. Fairfax County School Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Nevertheless, it has been recognized that the strong preference for the mainstreaming and inclusion of disabled students must yield where education in the regular classroom cannot meet a disabled student's particularized and individual needs. *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1044-1045 (5th Cir. 1989).

The task facing many courts and administrative tribunals in special education cases is reconciling the IDEA's preference for mainstreaming with its mandate that instruction be tailored to unique requirements of each disabled student. If supplementary aids and services cannot render a regular school setting appropriate for implementation of a student's IEP, then the IDEA requires that the student not be placed in the regular school.

Another factor must be added to this analysis. In seeking to provide the LRE which is consistent with a disabled child's individual needs, a local education agency must also seek a placement which is as close as possible to the student's home. 34 C.F.R. § 300.552(a)(3); COMAR 13A.05.01.08E(2)(b).

The IDEA does not guarantee any student "the best education, public or nonpublic, that money can buy" or "all [the] services necessary to maximize educational benefits." *Hessler v. State Board of Education of Maryland*, 700 F.2d 134, 139 (4th Cir 1983), citing *Rowley, supra*. On the contrary, the question is whether the education that the Child would receive at the placement(s) proposed would be "reasonably calculated to enable [a student] to achieve passing marks and advance from grade to grade." *Rowley*, 458 U.S. at 204, 102 S.Ct. at 3049. What is required, quite simply, is an appropriate education. *See also, COMAR* 13A.05.01.03.

In contrast to the procedural inquiry, the determination of whether a student is receiving, or could receive, beneficial instruction under a proposed IEP and placement is a somewhat more obscure analysis. No bright line test has been created to establish whether a student is progressing or could progress educationally. *Conklin v. Anne Arundel County Board of Education*, 946 F.2d 306, 313 (4th Cir. 1991) The ALJ is left to assess the evidence to determine whether it was more likely than not that the April 6, 1998 IEP and the placement(s) offered for the Child by the MCPS were reasonably calculated to enable him to receive appropriate educational benefit in the LRE.

There are experts on both sides in this case who have testified with opposing points of view. The credentials of all of those experts, in their respective fields, were impressive. Because each side's experts have diverging views on the question of what the Child's needs were and which placement would afford the requisite educational benefit for the Child, an assignment of the burden of proof in this case becomes critical.

There is no clear authority establishing which party bears the burden of proof on whether an IEP prepared for a student with a disability affords the student an opportunity for a FAPE. The case law provides support for assigning that burden to either party.

"In administrative and judicial proceedings, the school district bears the burden of proving the appropriateness of the IEP it has proposed." *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3rd Cir. 1995) (quoting *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3rd Cir. 1993)). "The School District had the burden of proving compliance with the IDEA at the administrative hearing, including the appropriateness of its evaluation." *Seattle School District No. 1 v. B.S.* 82 F.3d 1493, 1498 (9th Cir. 1996). *But See: Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) (The burden of proof rests with the party attacking the student's IEP); and *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986) (The party attacking an IEP bears the burden of showing why the educational setting and IEP are not appropriate.)

In *Alamo Heights*, the Court of Appeals for the Fifth Circuit explained the rationale for its view on the assignment of the burden of proof:

> [The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parent." In deference to this statutory scheme and the reliance it places on the expertise of local education authorizes, . . . [The IDEA] creates a "presumption in favor of the educational placement established by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."

790 F.2d at 1158 (quoting *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983)). "As the Court made clear in *Rowley*, once a procedurally proper IEP has been formulated, a reviewing [authority] should be reluctant indeed to second-guess the judgment of education professionals. 458 U.S. at 207-208, 102 S.Ct. at 3051-52." *Tice v. Botetcourt*, 908 F.2d 1200, 1207 (4th Cir. 1992).

Mindful of the reluctance expressed by the Court of Appeals for the Fourth Circuit in *Tice v. Botetcourt*, "to second-guess the judgement of education professionals," the ALJ believes that the rationale expressed by the Court of Appeals for the Fifth Circuit in *Alamo Heights*, is most instructive in determining which party should have the burden of proof in this case.

There has been a properly formulated IEP prepared for the Child by MCPS. There has been no demonstration of any violation of a procedural safeguard for the Parents and the Child under the IDEA. Where there has been an IEP formulated with no procedural safeguards violated, the party attacking the IEP should bear the burden of showing why the IEP and the educational setting are not appropriate.

In the matter *sub judice*, the Parents bear the burden of persuasion in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.[6]

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[6] On an entirely different footing, there is another reason to assign the burden of proof in this matter to the Parents.

The Parents contend that they are seeking only what they are entitled to under the IDEA. Under the IDEA, the parents and the local education agency should be equal partners in educating a student with disabilities.

On November 7, 1997, the Child's mother contacted MCPS in order to have the Child identified as a student with disabilities under the IDEA. On that date, the Child's mother indicated to a MCPS teacher that she had to find another private school for the Child to attend. During December 1997, the Parents were in contact with the McLean School of Maryland. On December 30, 1997, the Child, through his Parents, applied for admission to the McLean School of Maryland. On or about March 1, 1998, the Parents were notified by the McLean School of Maryland that the Child had been accepted as a student in the 8th Grade for the 1998-1999 school year. By March 16, 1998, the Parents had paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland to guarantee placement of the Child at that school for the 1998-1999 school year. On March 13, 1998, MCPS sent notice of the second ARD committee meeting to the Parents.

At the time the Parents paid a non-refundable $750.00 enrollment fee to the McLean School of Maryland, the Parents knew that the ARD committee meeting that was to prepare an IEP and determine a placement for the Child for the 1998-1999 school year had not yet taken place. The Parents and their attorney attended the April 6, 1998 ARD Committee meeting. This was a mock effort on the part of the Parents. Before the April 6, 1998 ARD Committee meeting, the Parents had already enrolled the Child at the McLean School of Maryland for the 1998-1999 school year. At the April 6, 1998 ARD Committee meeting, the Parents indicated that they would review the goals and objectives of the IEP, have private consultants review the IEP, visit the schools to

(Continued on following page)

The Parents obtained independent assessments of the Child at their own expense. The Parents submitted copies of the reports of those assessment to MCPS. When a parent obtains an independent educational evaluation at private expense, the results of the examination must be considered by the public agency in any decision made with respect to the provision of a FAPE. 34 C.F.R. 300.503(c). The regulation requires a local education agency to consider such a report, but it is within the discretion of that agency to accept or reject its findings, in whole or part. The independent assessments of the Child were extensively reviewed and considered by MCPS. MCPS accepted the independent psycho-educational evaluation of the Child but rejected the educational setting recommended. MCPS accepted, in-part, the independent speech-language assessment of the Child but rejected the educational setting recommended.

Well qualified witnesses testified on behalf of MCPS that the special education and related services identified

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observe the placements offered, and then re-contact MCPS. The Parents did not recontact MCPS and request any additional services and or goals be added to the Child's IEP for the 1998-1999 school year.

These events strongly suggests a design by the Parents to simply obtain funding from MCPS for their predetermined decision to have the Child enter the 8th Grade at the McLean School of Maryland. The Parents never approached their interaction with MCPS as a partnership in educating the Child as a student with disabilities. The Parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind that statute. On this additional basis, the Parents should bear the burden of proof in establishing that the IEP prepared for the Child by MCPS and/or the placement(s) offered for the Child for the 1998-1999 school year fail to afford the Child an opportunity for a FAPE.

by the April 6, 1998 IEP are appropriate to meet the Child's educational needs, that his IEP can be implemented at the Herbert Hoover Middle School or the Robert Frost Middle School, that his placement at either of those schools would be appropriate, and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended either of those schools.[7]

The Parents allege that the April 6, 1998 IEP is not appropriate based upon its intensity of service, provision of services in an "inclusion model" setting, and mainstreaming components. They assert that the Child requires a smaller class size, more intensive supervision, and, a more restrictive setting than available at the Herbert Hoover Middle School or the Robert Frost Middle School.

Ruth B. Spodak, Ph.D., testified as an expert witness for the Parents. Dr. Spodak was admitted as an expert witness in psychology and learning disabilities. During her testimony, she opined that the Child would receive only

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[7] The Parents contend that the testimony of the MCPS experts should be discounted because there is no indication that the expertise of those school officials has been brought to bear on the individual needs of the Child. In this regard, the Parents, at closing argument, cited *McKenzie v. Smith*, 771 F.2d 1527 (1985) as instructive. The facts in *McKenzie v. Smith* are distinguishable. In the cited case, the trial court found that the two primary expert witnesses called on behalf of the local education agency had not met the student or his parents, neither had any personal knowledge of the student, and both those primary expert witnesses admitted that they had not viewed all of the files and reports relating to the student. Similar foundational discrepancies in the opinions from MCPS expert witnesses have not been demonstrated in this record. In fact, in the matter *sub judice*, the opposite has been well established. (Findings of Fact #23, #25, #31, #32, #33, #35, #36, #39 & #40)

minimal educational benefit, not the appropriate benefit, in a placement at the Herbert Hoover Middle School or the Robert Frost Middle School. Dr. Spodak would not recommend that the Child be provided special education services in an "inclusion model" setting. According to Dr. Spodak, the Child's academic educational needs can only be met in small, self-contained special education classes. Small, self-contained special education classes are needed to minimize distractions in the academic setting and permit the Child to be available for learning.

Dr. Spodak did acknowledge, during cross examination, that the presence of a special educator in the "inclusion model" setting might minimize the distraction that she feared, depending on the role of the special educator and how effective the special educator was. Dr. Spodak acknowledged also that she had not observed the staff and special education services provided in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School. Insofar as Dr. Spodak has no first-hand knowledge on how a special educator in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School is used, and how effective the special educators at those schools are, the ALJ questions the probative value of her opinion that the Child could not receive other than minimal educational benefit in either of those schools.

The ALJ noted that the report of the psycho-educational evaluation of the Child from the offices of Ruth B. Spodak, Ph.D., & Associates, is not as definitive as the instant opinion offered by Dr. Spodak during the due process hearing, itself. That report (MCPS Exhibit #7) states in part:

> [The Child] will do best in a small, structured setting, where expectations are clear and consistent.

During cross-examination, Dr. Spodak revealed that she had only met with the Child for approximately ten (10) minutes. Diane Toby, Ph.D., psychologist, and Deanna Greenstein, Ph.D., a psychology associate, conducted the actual psycho-educational evaluation of the Child at the offices of Ruth B. Spodak, Ph.D. & Associates. After the evaluation of the Child, Dr. Spodak, Diane Toby, and Deanna Greenstein produced a written report. Dr. Spodak wrote 2 of the 19 pages in that report. Dr. Spodak wrote the portion of the report detailing the background information on the Child. The quotation from that report, listed above, was not taken from the portion of the report written by Dr. Spodak.

If, at the time the psycho-educational evaluation report was actually written, it was the consensus of Dr. Spodak, Diane Toby, and Deanna Greenstein that the Child *must* be educated in small, self-contained special education classes, the ALJ would have expected to see that sort of statement as one of the recommendations in the report. Because of the absence of that sort of statement in the report, and the fact that Dr. Spodak, herself, had not conducted the actual evaluation of the Child, the ALJ further questions the probative value of Dr. Spodak's opinion that the Child could receive only minimal educational benefit in anything other than small, self-contained special education classes.

Barbara J. Butera, School Psychologist, MCPS, testified on behalf of the MCPS. Barbara Butera was admitted as an expert witness in school psychology. Barbara Butera's observation and psychological assessment of the Child were consistent with the assessment of the Child presented in the report on the Child from the office of Ruth B. Spodak, Ph.D & Associates. However, Barbara Butera opined that the April 6, 1998 IEP was appropriate to meet the Child's educational needs and that the Child would obtain significant, measurable benefit during the 1998-1999 school year if he attended the Herbert Hoover Middle School or the Robert Frost Middle School.

Carol A. Kamara, Ph.D, testified as an expert witness for the Parents. Dr. Kamara was admitted as an expert witness in Speech/Language Pathology and Audiology. Dr. Kamara was the key witness for the Parents. Dr. Kamara testified that the Child has a unique problem with "central auditory processing." According to Dr. Kamara, to address his "central auditory processing" problem, the Child's educational needs can only be met in small, self-contained special education classes. Dr. Kamara was critical of the proposed placement in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School because of the risk of simultaneous messages, distractions, and possible distortions of audio signals in that setting. Dr. Kamara further testified that the Child's critical need – his "central auditory processing" problem – was not addressed in the April 6, 1998 IEP.

In her opinion, Dr. Kamara relied heavily on the results of one formal test of the Child known as the "SCAN-A." However, during cross-examination, Dr. Kamara acknowledged that no test should be treated as conclusive in determining what a student's performance is, or will be, in the real education environment. In addition, Dr. Kamara acknowledged that it was not possible to determine if the Child's score on the "SCAN-A" was the result of the his "central auditory processing" problem or the result of his ADHD, or a combination of same.

Pamala Zahra, Speech/Language Pathologist, Herbert Hoover Middle School, MCPS, testified on behalf of the MCPS. Pamala Zahra was admitted as an expert witness in Speech/Language Pathology. She indicated that, in her opinion, based on an informal assessment that she conducted, that the Child did not exhibit evidence of a "central auditory processing" problem.

Because it is not possible to ascertain if the Child's score on the "SCAN-A" was the result of a "central auditory processing" problem or the result of his ADHD, and because the child did not exhibit evidence of a "central auditory processing" problem during an informal assessment conducted by MCPS, the ALJ questions the probative value of Dr. Kamara's opinion that the Child has a need – "central auditory processing" – that was not addressed in the April 6, 1998 IEP.

Pamala Zahra, testifying on behalf of the MCPS, indicated that, in a relative sense, overall, the Child suffers from a mild speech-language disability. Pamala Zahra explained her reasons for that view. The Child has areas of strengths and weaknesses in his ability to communicate. Dr. Kamara would not offer an opinion along the same line. That is whether, overall, in a relative sense, the Child has a mild, moderate, or severe speech-language disability. Dr. Kamara explained that she would not reduce to such simple terms the unique speech-language characteristics of the Child as a student with disabilities. The ALJ was not impressed, by what the ALJ perceived to be, evasion of that question by Dr. Kamara. The ALJ

infers that an answer from Dr. Kamara to that question would not have been inconsistent with the opinion from Pamala Zahra.

The ALJ noted that the report of the comprehensive speech-language assessment from Dr. Kamara, lends more support to the argument advanced on behalf of the MCPS, than her instant opinion offered during the due process hearing, itself. That report (MCPS Exhibit #3) states in part:

> *[The Child] demonstrated many average and borderline average skills that might seem to allow him to be placed appropriately in a regular education setting with some special education support.* However, his reading issues posed tremendous concern because the opportunity to receive individualized remedial reading instruction in a regular education setting typically does not occur, and he must have a specialized type of remedial instruction in reading if he is going to effectively use reading to learn. His serious needs in reading, writing, spelling, and math, indicate that he should be placed in a self-contained, full-day special education program. (emphasis added)

Dr. Kamara acknowledged also that she had not observed the staff and special education services provided in the "inclusion model" setting at the Herbert Hoover Middle School or the Robert Frost Middle School. Because Dr. Kamara had no opportunity to view the "inclusion model" setting at those schools, the ALJ further questions the probative value of her opinion that the Child will not be able to receive the remedial instruction he needs in the placement(s) proposed by MCPS.

There is an inherent concern in evaluating testimony from experts such as Dr. Spodak and Dr. Kamara. Their knowledge of special education law is extensive. Their testimony during the instant hearing is couched in terms taken from the case law. Their testimony purports to be consistent with the recommendations listed in their written assessments of the Child. Those written assessments were created before the Parents requested a due process hearing. It is common sense to expect that recommendations from a private consultant, who conducts an assessment of a student with disabilities, and who is privately paid on behalf of that student, would be, and should be, designed to maximize that student's potential, not simply to allow "educational benefit" to the student with disabilities so that the student receives the "basic floor of opportunity" provided for by the IDEA. *Board of Education v. Rowley*, 458 U.S. at 200-01, 102 S.Ct. at 3048.

The Parents suggest that the April 6, 1998 IEP as written does not include a required related service. The Parents point out that the April 6, 1998 IEP provides for speech-language therapy for the Child in a small group setting. The Parents contend that the report from Dr. Kamara specifies that the Child needs speech-language therapy on an individual basis. In pertinent part, that report (MCPS Exhibit #3) reads:

> [The Child] continues to need speech-language therapy to address a number of auditory processing, memory, syntactic, word retrieval, and organizational pragmatic deficits. . . . An individual 45-60 minute therapy session one time per week should be adequate to meet his needs, but if 30-minute sessions are provided, then he should receive two sessions each week. *His linguistic rule issues are not unusual and may be addressed in a small group of students who have similar issues, so if he is put into two 30-minute sessions, one of those might be in a small group setting.*
>
> (emphasis added)

Dr. Kamara states in her report that the Child's linguistic issues are not unusual and might be addressed in a small group setting.

Pamala Zahra, testifying as an expert witness on behalf of the MCPS, opined that the 45 minutes of the speech-language therapy each week that would be provided for the Child in a small group setting of 2-5 students, in accordance with the April 6, 1998 IEP, would be adequate to meet the Child's needs for this related service.

The Parents have failed to persuade the ALJ that the Child needs speech-language therapy as a related service on an individual basis as opposed to the small group setting of 2-5 students as proposed by the MCPS.

As a student, the Child has strengths as well as weaknesses. Even without being coded as a special education student, without receiving any services from a qualified special educator, the Child achieved (admittedly with extensive classroom and testing accommodations), a passing grade in all his subjects for the third trimester of the 1997-1998 school year at the Green Acres School. On this record, the ALJ is skeptical of the Parents' assertion that the Child's educational environment must shift from a fully mainstreamed regular education class setting in all academic subjects in a private school to a very restrictive special education setting in all academic subjects during the 1998-1999 school year in order for the Child to receive anything other than minimal educational benefit.

The Parents' claim has presented a contest of experts requiring a determination of the probative value of their opinion between opposing factions. The Parents carry the burden of proof on the merit of their claim. The Parents clearly believe that their son would receive greater educational benefit from an environment limited to a small number of disabled students which would be provided at the McLean School of Maryland. They may be correct. That, however, is not the standard by which the provision of a FAPE must be judged. The Parents have failed to persuade the ALJ that the April 6, 1998 IEP was not reasonably calculated to provide educational benefit, or that the placement(s) offered by MCPS are not appropriate to provide for the Child's educational needs in accordance with the IDEA.

The ALJ believes the April 6, 1998 IEP was reasonably calculated by MCPS to provide educational benefit and to meet the Child's educational needs, that his IEP can be implemented at the Herbert Hoover Middle School or the Robert Frost Middle School, and that the Child would obtain significant, measurable educational benefit during the 1998-1999 school year if he attended either of those schools. Having made this determination, the ALJ does not reach the question of whether, on this record, placement of the Child at the McLean School of Maryland during the 1998-1999 school year would be *more* appropriate.

The ALJ is not unsympathetic to the challenges that the special needs of the Child present to the Parents. A possibility exists that a program could be crafted at the McLean School of Maryland, in fact, *more* educationally beneficial to the Child than what is reflected on the April 6, 1998 IEP. From a legal standpoint however, that is not the test that can be applied. MCPS is only required to offer the Child an opportunity for an *appropriate* education, not the ideal.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact and discussion, the ALJ concludes, as a matter of law that the goals and objectives, special education and related services, called for by the April 6, 1998 IEP, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-1999 school year as required by the IDEA. 20 U.S.C. § 1400(c) (1997); Md. Code Ann., Educ. § 8-413 (1997).

ORDER

IT IS ORDERED THEREFORE, that the April 6, 1998 IEP, as proposed by MCPS for the Child be, and hereby is, AFFIRMED; and

IT IS FURTHER ORDERED, that the Parents' request for an order directing placement of the Child at the McLean School of Maryland for the 1998-1999 school year be, and hereby is, DENIED.

July 9, 1998 /s/ S.J. Nichols

Date

Stephen J. Nichols
Administrative Law Judge

APPEAL RIGHTS

Any party aggrieved by this final Decision of the Maryland State Department of Education may appeal it by filing a petition for judicial review with the circuit court for the county where the child resides or the United States District Court for Maryland, without regard to the amount in controversy, within 180 days after the date that notice of the decision is sent, in accordance with Md. Code Ann., Educ. § 8-413 (1997).

APPENDIX

The following documents were admitted on behalf of MCPS:

MCPS # 1 – Parent Interview/Questionnaire.

MCPS # 2 – Educational history with attachments.

MCPS # 3 – Speech/Language Assessment, dated December 9, 1997.

MCPS # 4 – Secondary teacher referral/reports.

MCPS # 5 – Classroom observation, dated December 17, 1997.

MCPS # 6 – Correspondence to David Cross from Holly Parker, dated December 24, 1997.

MCPS # 7 – Psycho-Educational evaluation, dated January 1998.

MCPS # 8 – Correspondence to Parents from Mary Lee Phelps, dated January 7, 1998.

MCPS # 9 – Correspondence to Parents from Caroline Kursman, dated January 14, 1998.

MCPS # 10 – Correspondence to Caroline Kursman from Holly Parker, dated February 17, 1998.

MCPS # 11 – Special needs consultation, dated February 19, 1998.

MCPS # 12 – Classroom observation, dated February 19, 1998.

MCPS # 13 – Green Acres School record summary.

MCPS # 14 – Student screening profile worksheet.

MCPS # 15 – Correspondence with attachments to Parent from Caroline Kursman, dated February 26, 1998.

MCPS # 16 – Correspondence to Linda Brand from Holly Parker, dated March 5, 1998.

MCPS # 17 – Psychological evaluation review, dated March 12, 1998.

MCPS # 18 – Correspondence to Parents from Caroline Kursman, dated March 13, 1998.

MCPS # 19 – Correspondence to Caroline Kursman from Holly Parker, dated March 13, 1998.

MCPS # 20 – Speech/language assessment review, dated March 13, 1998.

MCPS # 21 – Educational assessment report review, dated March 15, 1998.

MCPS # 22 – Occupational therapy evaluation, dated March 18, 1998.

MCPS # 23 – Correspondence to Parents from Caroline Kursman, dated April 9, 1998, with attached 1998-99 IEP.

MCPS # 24 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

MCPS # 25 – Request for due process hearing, dated May 26, 1998.

MCPS # 26 – Correspondence to Holly Parker from Zvi Greismann, dated May 28, 1998.

MCPS # 27 – Brand chronology.

MCPS # 28 – Thayer chronology.

MCPS # 29 – Subpoena Duces Tecum to the Custodian of Records of The McLean School.

MCPS # 30 – Application for admission to The McLean School, dated December 30, 1997.

MCPS # 31 – Progress report from the Green Acres School, dated June 1998.

MCPS # 32 – Authorization of release of confidential information, dated December 19, 1997.

MCPS # 33 – Letter of acceptance from The McLean School, dated March 1, 1998.

The following documents were admitted on behalf of the Parents:

Parent # 1 – Request from mediation/due process hearing, dated May 26, 1998.

Parent # 2 – Correspondence to Raymond Bryant from Holly Parker, dated May 5, 1998.

Parent # 3 – Special needs consultation, dated February 19, 1998.

Parent # 4 – Psycho-Educational evaluation, dated January 1998.

Parent # 5 – Speech/language assessment, dated December 9, 1997.

Parent # 6 – Report cards for grades 6th and 7th.

Parent # 7 – Correspondence and progress report to Parents from Green Acres School sixth grade team, dated May 27, 1997.

Parent # 8 – Neuropsychological evaluation, dated January 24 26, 1995.

Parent # 9 – Psychological evaluation, dated August 24, 1991.

Parent # 10 – Speech/language progress/evaluation report, dated September & October 1990.

Parent # 11 – Speech/language re-evaluation, dated March 15, 1989.

Parent # 12 – Speech/language evaluation, dated August 5, 1988.

Parent # 13 – Occupational therapy evaluation, dated August 1, 1988.

Parent # 14 – Speech/language therapy progress report, dated August 1988.

Parent # 15 – Speech/language therapy progress report, dated June 22, 1997.

Parent # 16 – Correspondence to Parents from Nan Shapiro, dated May 5, 1998.

Parent # 17 – Comprehensive testing program report.

Parent # 18 – Review of assessment, dated March 1998.

Parent # 19 – List of SLP issues.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

6500 CHERRYWOOD LANE
GREENBELT, MARYLAND 20770
301-344-0632

MEMORANDUM

TO: Counsel of Record

FROM: Judge Peter J. Messitte

RE: *Schaffer v. Weast, et al.*
Civil Case No. PJM 99-15

DATE: October 29, 2004

* * *

The Court has reviewed the Joint Status Report of the parties as set forth in Counsels' letter of October 28, 2004.

The Court will STAY action in the proceedings pending the Supreme Court's action on Plaintiffs' Petition for Certiorari.

The Case will be ADMINISTRATIVELY CLOSED in the meantime.

Despite the informal nature of this ruling, it shall constitute an Order of Court and the Clerk is directed to docket it accordingly.

/s/
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

cc: Court File

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 24, 2004

No. 03-1030
CA-99-15-PJM

JERRY WEAST, Superintendent of
Montgomery County Public Schools;
BOARD OF EDUCATION OF
MONTGOMERY COUNTY

Plaintiffs-Appellants

v.

BRIAN SCHAFFER, a minor, by his parents
and next friends, Jocelyn and Martin Schaffer;
JOCELYN SCHAFFER; MARTIN SCHAFFER

Defendants-Appellees

- - - - - - - - - - - - - - -

NATIONAL SCHOOL BOARDS ASSOCIATION;
MARYLAND ASSOCIATION OF BOARDS
OF EDUCATION; NORTH CAROLINA
SCHOOL BOARDS ASSOCIATION; SOUTH
CAROLINA SCHOOL BOARD ASSOCIATION;
VIRGINIA SCHOOL BOARDS ASSOCIATION

Amici Supporting Appellant

- - - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing En Banc

- - - - - - - - - - - - - - -

Appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this

Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Wilkinson, Judge Luttig, and Judge Michael.

For the Court,

/s/ Patricia S. Connor
Patricia S. Conner
CLERK

20 USCS § 1400 (2004)

§ 1400. Short title; table of contents; findings; purposes

(a) Short title. This Act [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975] –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this Act [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this Act [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible;

(B) strengthening the role of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this Act [20 USCS §§ 1400 et seq.] with other local, educational service agency, State, and Federal school improvement efforts in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where they are sent;

(D) providing appropriate special education and related services and aids and supports in the regular classroom to such children, whenever appropriate;

(E) supporting high-quality, intensive professional development for all personnel who work with such children in order to ensure that they have the skills and knowledge necessary to enable them –

(i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and

(ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible;

(F) providing incentives for whole-school approaches and pre-referral intervention to reduce the need to label children as disabled in order to address their learning needs; and

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results.

(6) While States, local educational agencies, and educational service agencies are responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) (A) The Federal Government must be responsive to the growing needs of an increasingly more diverse society. A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(B) America's racial profile is rapidly changing. Between 1980 and 1990, the rate of increase in the population for white Americans was 6 percent, while the rate of increase for racial and ethnic minorities was much higher: 53 percent for Hispanics, 13.2 percent for African-Americans, and 107.8 percent for Asians.

(C) By the year 2000, this Nation will have 275,000,000 people, nearly one of every three of whom will be either African-American, Hispanic, Asian-American, or American Indian.

(D) Taken together as a group, minority children are comprising an ever larger percentage of public school students. Large-city school populations are overwhelmingly minority, for example: for fall 1993, the figure for Miami was 84 percent; Chicago, 89 percent; Philadelphia, 78 percent; Baltimore, 84 percent; Houston, 88 percent; and Los Angeles, 88 percent.

(E) Recruitment efforts within special education must focus on bringing larger numbers of minorities into the profession in order to provide appropriate practitioner knowledge, role models, and sufficient manpower to address the clearly changing demography of special education.

(F) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's 2 largest school districts, limited English proficient students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds.

(8) (A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) Poor African-American children are 2.3 times more likely to be identified by their teacher as having mental retardation than their white counterpart.

(D) Although African-Americans represent 16 percent of elementary and secondary enrollments, they constitute 21 percent of total enrollments in special education.

(E) The drop-out rate is 68 percent higher for minorities than for whites.

(F) More than 50 percent of minority students in large cities drop out of school.

(9) (A) The opportunity for full participation in awards for grants and contracts; boards of organizations receiving funds under this Act [20 USCS §§ 1400 et seq.]; and peer review panels; and training of professionals in the area of special education by minority individuals, organizations, and historically black colleges and universities is essential if we are to obtain greater success in the education of minority children with disabilities.

(B) In 1993, of the 915,000 college and university professors, 4.9 percent were African-American and 2.4 percent were Hispanic. Of the 2,940,000 teachers, prekindergarten through high school, 6.8 percent were African-American and 4.1 percent were Hispanic.

(C) Students from minority groups comprise more than 50 percent of K-12 public school enrollment in seven States yet minority enrollment in teacher training programs is less than 15 percent in all but six States.

(D) As the number of African-American and Hispanic students in special education increases, the number of minority teachers and related service personnel produced in our colleges and universities continues to decrease.

(E) Ten years ago, 12 percent of the United States teaching force in public elementary and secondary schools were members of a minority group. Minorities comprised 21 percent of the national population at that time and were clearly underrepresented then among employed teachers. Today, the elementary and secondary teaching force is 13 percent minority, while one-third of the students in public schools are minority children.

(F) As recently as 1991, historically black colleges and universities enrolled 44 percent of the African-American teacher trainees in the Nation. However, in 1993, historically black colleges and universities received only 4 percent of the discretionary funds for special education and related services personnel training under this Act [20 USCS §§ 1400 et seq.].

(G) While African-American students constitute 28 percent of total enrollment in special education, only 11.2 percent of individuals enrolled in preservice training programs for special education are African-American.

(H) In 1986-87, of the degrees conferred in education at the B.A., M.A., and Ph.D. levels, only 6, 8, and 8 percent, respectively, were awarded to African-American or Hispanic students.

(10) Minorities and underserved persons are socially disadvantaged because of the lack of opportunities in training and educational programs, undergirded by the practices in the private sector that impede their full participation in the mainstream of society.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are –

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting systemic-change activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 37.)

20 USCS § 1415 (2004)

§ 1415. Procedural safeguards

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include –

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2) procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

(3) written prior notice to the parents of the child whenever such agency –

(A) proposes to initiate or change; or

(B) refuses to initiate or change; the identification, evaluation, or educational placement of the child, in accordance with subsection (c), or the provision of a free appropriate public education to the child;

(4) procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5) an opportunity for mediation in accordance with subsection (e);

(6) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7) procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential) –

(A) to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B) that shall include –

(i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii) a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8) procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice. The notice required by subsection (b)(3) shall include –

(1) a description of the action proposed or refused by the agency;

(2) an explanation of why the agency proposes or refuses to take the action;

(3) a description of any other options that the agency considered and the reasons why those options were rejected;

(4) a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5) a description of any other factors that are relevant to the agency's proposal or refusal;

(6) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.].

(d) Procedural safeguards notice.

(1) In general. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum –

(A) upon initial referral for evaluation;

(B) upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C) upon registration of a complaint under subsection (b)(6).

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) opportunity to present complaints;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) mediation;

(J) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K) State-level appeals (if applicable in that State);

(L) civil actions; and

(M) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k).

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process –

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 682 or 683 [20 USCS § 1482 or 1483]; or

(ii) an appropriate alternative dispute resolution entity; to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G) Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing.

(1) In general. Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations.

(A) In general. At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing. A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child.

(g) Appeal. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 617(c) [20 USCS § 1417(c)] (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)]).

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2) of this subsection.

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements. In any action brought under this paragraph, the court –

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that –

(i) the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7);

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(7), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) School personnel under this section may order a change in the placement of a child with a disability –

(i) to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii) to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if –

(I) the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

(II) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B) Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) –

(i) if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii) if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer. A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer –

(A) determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B) considers the appropriateness of the child's current placement;

(C) considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D) determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting.

(A) In general. The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements. Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall –

(i) be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii) include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review.

(A) In general. If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children –

(i) not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii) immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review. A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review. In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team –

(i) first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I) evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

(II) observations of the child; and

(III) the child's IEP and placement; and

(ii) then determines that –

(I) in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II) the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III) the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability.

(A) In general. If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)].

(B) Additional requirement. If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal.

(A) In general.

(i) If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii) The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

(B) Review of decision.

(i) In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii) In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals.

(A) In general. When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement. If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing.

(i) If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii) In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(8) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if –

(i) the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii) the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 614 [20 USCS § 1414]; or

(iv) the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities.

(A) Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions. For purposes of this subsection, the following definitions apply:

(A) Controlled substance. The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug" –

(i) means a controlled substance; but

(ii) does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Substantial evidence. The term "substantial evidence" means beyond a preponderance of the evidence

(D) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the public agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part B, § 615, as added June 4, 1997, P.L. 105-17, Title I, § 101, 111 Stat. 88.) (As amended April 29, 1999, P.L. 106-25, § 6(a), 113 Stat. 49.)

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Supreme Court U.S.
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No. 04-698

In The
Supreme Court of the United States

◆

BRIAN SCHAFFER, a Minor,
by His Parents and Next Friends,
Jocelyn and Martin Schaffer, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent,
Montgomery County Public Schools, *et al.*,

Respondents.

◆

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

◆

BRIEF IN OPPOSITION

◆

Zvi Greismann
Counsel of Record
MONTGOMERY COUNTY
PUBLIC SCHOOLS
850 Hungerford Drive
Room 174
Rockville, Maryland 20850
(301) 279-3549

Counsel for Respondents

Eric Brousaides
REESE & CARNEY, LLP
10715 Charter Drive
Columbia, Maryland 21044
(301) 621-5255

Counsel for Respondents

THE LEX GROUP^DC ◆ 1750 K Street, NW ◆ Suite 475 ◆ Washington, DC 20006
(202) 955-0001 ◆ Fax: (202) 955-0022 ◆ www.thelexgroupdc.com

QUESTION PRESENTED

Whether, as found by the Court of Appeals below, the burden of proof in an administrative hearing brought under the Individuals with Disabilities Education Act is properly allocated to the party requesting the hearing.

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STATEMENT OF THE CASE

Background

Brian Schaffer is a disabled child as defined by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq*. He was born on May 13, 1994, and attended the Green Acres School ("Green Acres"), a private non-special education school from pre-kindergarten through the 1997-98 school year when he completed his seventh grade. He was placed there by his parents and had never been previously enrolled with the Montgomery County Public Schools ("MCPS"), much less received special education services from MCPS. App.124.

On November 7, 1997, Brian's mother contacted Linda Brand, an MCPS special education teacher at Herbert Hoover Middle School ("Hoover") and requested that MCPS assess Brian to determine if he was eligible for special education services. During this conversation Brian's mother stated that she had to find another private school for Brian to attend. App.125-126. Over the next two months the parents hired persons to assess Brian's educational abilities and submitted those assessments to MCPS.

On December 30, 1997, before Brian's testing was complete and before MCPS had a chance to draft an Individualized Education Program ("IEP") for Brian, the parents filed an application with the McLean School, a private, non-special education school, seeking Brian's admission for the 1998-99 school year. On March 1, 1998, Brian was accepted at the McLean School for the 1998-99 school year. App.129.

Within two weeks, and well before MCPS had an opportunity to offer the parents an IEP, the parents paid

$750.00 to the McLean School as a non-refundable enrollment fee for the 1998-99 school year. App.129-30.

MCPS convened IEP meetings on February 26, 1998, and April 6, 1998. After having considered all of the available records and documentation, the IEP team identified Brian as a student with a speech-language disability and a learning disability. The team developed an IEP and recommended that Brian attend the Hoover Middle School ("Hoover"), Brian's neighborhood school, for the 1998-99 school year. App.132-134.

The proposed program included 15.3 hours of special education services per week and 45 minutes of speech-language therapy per week. App.128-133. The special education services would have been provided in an "inclusion model," where World Studies, Science and English classes would be co-taught by a special educator and a general educator. App.134. The special education teacher would focus on and provide services to the five or six students in the class who had IEP's. App.134. The speech-language therapy would have been provided in a small group of between two and five students. App.134. Under the proposed program, Brian would also have received an additional 45 minutes of intensive reading and writing support from a special education resource teacher in a small self-contained class of between six and eight students. App.134. The parents declined to visit and observe the proposed program at Hoover Middle School. App.135. (The Petitioners' characterization of larger class sizes as forming the centerpiece of the proposed program is thus inaccurate. Petition, p.6.)

Petitioners state that in making its recommendation, the school system rejected the conclusions of the parents' private evaluators. Petition, p.5. However, the school district did in fact consider the information the parents had presented. The IEP team had reviewed the private evaluations provided by the parents and incorporated the test results and recommendations of the testing in developing the IEP. In fact, after the parents rejected the proposed placement at Hoover, school officials offered a second option - implementing the IEP at the Frost Middle School ("Frost"), which was only ten minutes from Brian's home, and where there were more small self-contained classes. App.134-35.

Thus, MCPS fully took into consideration the views of the parents and their experts and offered two appropriate programs for the student. The parents rejected both programs, and placed Brian at the McLean School, a private school that was not certified by the Maryland State Department of Education as an approved special education school. App.137. The McLean School accepts regular education students and students who *do not* have severe learning disabilities. App.137.

Petitioners inaccurately state the school district's staff were "less informed" about the student's needs than were the parents' experts. Petition, p.5. In fact, MCPS school officials had a greater knowledge base about the child than the parents' experts. For example, Linda Brand, the MCPS special education expert reviewed the private reports submitted by the parents, met with the child, administered educational testing and prepared goals and objectives that incorporated the needs identified in the reports of Dr. Ruth Spodak and Dr. Carol Kamara, the parent's experts. App.129-30. Pamela Zahra, the MCPS speech pathology expert met with the child, conducted an informal assessment, tested the child's phonological skills and prepared goals and objectives that incorporated the needs identified in Dr. Kamara's report. App.130-31. Likewise, Dr. Butera, the MCPS psychologist and Doris Shierly, another special education expert from Frost, reviewed the child's records, conducted testing and were of the opinion that both programs recommended by MCPS could appropriately implement the proposed IEP. App.32-33; 134-36.

In stark contrast, the parents experts had spent minimal time with Brian and they had not observed the programs proposed by MCPS. App.149-50. Indeed, Dr. Spodak had spent only ten minutes with Brian. App.150. Like Dr. Spodak, Dr. Kamara had no first hand knowledge of the proposed programs at Hoover or Frost. App.153. The ALJ found the testimony of both the parents' expert witnesses lacking in probative value. App.150, 153.

PROCEEDINGS BELOW

The Schaffers initiated a due process hearing under the IDEA on May 26, 1998, seeking funding for their unilateral placement of the student at the non-approved McLean School for the 1998-1999 school year.

After reviewing the applicable case law on burden of proof, ALJ Nichols found that the burden of proof should be on the parents as the party attacking the IEP. App.146. Judge Nichols cited *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) and *Tice v. Botetcourt*, 908 F.2d 1200, 1207 (4th Cir. 1992) and held that once a procedurally proper IEP has been formulated, reviewing authorities should be reluctant indeed to second guess the judgment of education professionals. App.145.

In his July 9, 1998, decision, ALJ Nichols, found in favor of MCPS and determined that "the child would obtain significant, measurable educational benefit during the 1998-99 school year" if he attended either Hoover or Frost. App.56. The ALJ concluded "[a]s a matter of law that the

goals and objectives, special education and related services, called for by the April 6, 1998, IEP, and the placement(s) for the Child offered by MCPS, affords the Child an opportunity for a FAPE for the 1998-99 school year as required by the IDEA." App.157.

The ALJ further found that with regard to the parents' participation in the IEP process, such:

> was a mock effort on the part of the Parents ... [which] strongly suggests a design by the Parents to simply obtain funding from MCPS for their predetermined decision to have the child enter the 8th grade at the McLean School of Maryland. The parents never approached their interaction with MCPS as a partnership in educating the child as a student with disabilities. The parents may have followed the letter of their obligations under the IDEA, however, their activities are inconsistent with the congressional intent behind the statute.

App.146, n.6.

The parents appealed the ALJ's decision to the United States District Court on January 5, 1999. Both parties filed motions for summary judgment. On March 16, 2000, the district court issued a memorandum opinion and order leaving intact the ALJ's decision concerning the appropriateness of the MCPS IEP and placement. However, the court concluded that in a case involving an initial IEP, the school district should have had the burden of proof at the administrative hearing stage. App.54, 68. Accordingly, the court remanded the case to the ALJ.

On April 14, 2000, MCPS filed a notice of appeal with the United States Court of Appeals for the Fourth

Circuit arguing that the lower court erred in assigning the burden of proof to MCPS.

On October 25, 2000, while the appeal to the Fourth Circuit was pending, a hearing was reconvened before ALJ Nichols. No new evidence was admitted. Rather, only oral argument was presented. Based solely on the reallocation of the burden of proof ordered by the district court, and despite the absence of any new evidence, ALJ Nichols reversed his earlier findings and concluded that MCPS had not offered the student a FAPE for the 1998-1999 school year. App.70. However, noting that tuition reimbursement was a form of equitable relief, and finding that the parents would have rejected any public school placement offered by MCPS, ALJ Nichols ordered that the parents be reimbursed for only one half of the McLean School tuition for the 1998-1999 school year. App.110-115.

On February 5, 2001, the United States Court of Appeals for the Fourth Circuit vacated and remanded the March 16, 2000 decision of the district court, directing the district court to consolidate and consider the burden of proof issue with the merits of the case. App.50.

On remand, and with the parties each appealing the ALJ's second decision, the district court issued a memorandum opinion and order dated November 25, 2002. The district court affirmed that portion of the ALJ's second decision that found that MCPS had not offered a FAPE available to the student; reversed the ALJ's decision awarding the Schaffers only one-half of the McLean School tuition; and directed MCPS to pay the full tuition for the 1998-99 school year. The district court also denied the parents' request for tuition reimbursement for thee 1999-2000 and 2000-2001 school years because the parents had not exhausted their administrative remedies as to those school years. App.21, 47-8.

Regarding the burden of proof issue, the district court restated its earlier position and found that in hearings involving initial IEP's the burden of proof should be on the district, and in cases where there is an existing IEP the burden should be on the party proposing a change. App.40. The court declined to address situations where both parties have proposed a change. App.33, n.5.

MCPS again noted an appeal to the Court of Appeals for the Fourth Circuit. In a comprehensive opinion, the Fourth Circuit determined that there was "no reason to depart from the general rule that a party initiating a proceeding" bears the burden of proof. App.15. The Court of Appeals did not place the burden of proof on the parents in all instances. Rather, parents, like school systems, will bear the burden of proof if they request a hearing. The case was again remanded to the district court, which has stayed the case pending disposition of the instant Petition for Certiorari. App.163.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Petitioners have presented no compelling reason for the Court to exercise its discretion in granting the writ.

I. THERE IS NO REASON TO DEPART FROM THE GENERAL RULE THAT A PARTY INITIATING AN ACTION HAS THE BURDEN OF PROOF

A. The IDEA offers parents and children numerous protections.

The IDEA is silent as to which party bears the burden of proof in an administrative hearing brought under the IDEA. When a statute is silent, the burden of proof is generally allocated to the party requesting the hearing and seeking relief. *See, e.g.*, J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999); *Dalton v. Capital Assoc. Indus. Inc.*, 257 F.3d 409, 416 (4th Cir. 2001); *Newport News Shipbuilding & Dry Doc Co. v. Loxley*, 934 F.2d 511, 516 (4th Cir. 1991); *Edison v. Department of the Army*, 672 F.2d 840, 842, (11th Cir. 1982). That allocation is also proper in IDEA administrative hearings.

Seeking to evade the strictures of this general rule, the Petitioners assert that the burden of proof should be viewed as one of the substantive educational rights afforded to children with special needs under the IDEA. Absent this right, Petitioners posit that school systems will "ratchet down" services from previously agreed upon levels; "negotiation dynamics" will be tilted towards the school system; and parents will find the hearing process "too daunting and simply capitulate." Petition, pp.28-29.

These asserted fears are fanciful and overlook the obvious: this Court has already established the substantive level of services that are to be afforded children with disabilities under the IDEA. In *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court held that the Act requires that school systems design a program that is reasonably calculated to confer some educational benefit to the disabled student. *Rowley*, 102 S. Ct. at 3048. This level of service does not wax and wane with the allocation of the burden of proof.

Moreover, if a school system did recommend that a student receive a decreased level of special education services, the parents could request an administrative hearing to contest the reduction. During the pendency of the administrative and judicial proceedings, the school system is required to maintain the previously agreed upon level of services pursuant to the "current educational placement" provision of the IDEA. 20 U.S.C. § 1415(j). *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 3 (1st Cir. 1999); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 695 (5th Cir. 1996); *Wagner v. Board of Education of Montgomery County*, 335 F.3d 297, 301 (4th Cir. 2003); *Drinker v. Colonial Sch. Dist.*,78 F.3d 859, 864_65 (3d Cir. 1996); *Zvi D. v. Ambach*, 694 F.2d 904 (2d Cir. 1982). Thus, a school system could not "ratchet down" levels of service unless such was found to be appropriate through the administrative and judicial review process.

Petitioners' assertion that parents will find the hearing process "too daunting and simply capitulate" if school systems are not allocated the burden of proof is without merit. Petition, pp.28. It is highly unlikely that a parent who believes that his or her child is not receiving sufficient services will forgo a challenge merely because of an evidentiary rule that is common to most litigants. Further, when a parent requests an administrative hearing, the IDEA requires that the school system "inform the parent of any free or low-cost legal and other services available in the area". 34 C.F.R. § 507(a)(3). Thus, there are protections built into the IDEA to protect the student, and assist the parents, with the hearing process.

Petitioners state that allocation of the burden of proof "can effect the outcome much earlier in the process" as such will change the "negotiation dynamics" of the IEP process. Petition, p.29. Petitioners' speculation in this regard is again flawed. IEP teams, of which parents are members, develop the substance of an IEP by considering the educationally-relevant information brought to the IEP meeting. 34 C.F.R. §§ 300.345, 300.346(a). An IEP is not generated based upon allocation of the burden of proof. Further, parents may bring to the IEP meeting any persons who have knowledge or expertise regrading the child. 34 C.F.R. § 300.344(a)(6). Prior to any IEP meeting, the parents are also entitled to inspect and review any education record relating to their child. 34 C.F.R. § 300.562(a). Thus, parents come into IEP meetings well prepared for the discussions that occur as part of the IEP development process. If there is an aspect of the IDEA that changes the "negotiation dynamics" between the parties, it is the understanding that the parents, if they prevail in a dispute regarding their child's education, will be able to recover their attorney's fees from the school system. 34 C.F.R. § 300.513.

Petitioners erroneously state that placing the burden of proof on parents would "undermine IDEA's provisions that ensure parents meaningful participation in developing the IEP." Petition, p.11. The burden of proof plays no role in the educational decision making process at the school level as Petitioners contend. The burden of proof only comes into play if and when a party initiates a hearing and a hearing is held. Indeed, in the present case, ALJ Nichols found that the parents "fully participated" in the development of their child's IEP. App.132. Allocation of the burden of proof played no role in this participation.

Further, the IDEA contains explicit provisions which ensure that parents participate meaningfully in the creation and revision of their child's IEP. School systems are required to "take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting" including notifying the parents "early enough to ensure that they will have an opportunity to attend" and by "scheduling the meeting at a mutually agreed on time and place." 34 C.F.R. § 300.345(a). An IEP meeting can only be held without a parent's participation "if the public agency is unable to convince the parents that they should attend." 34 C.F.R. § 300.345(d). In this event, the school system must document its efforts to secure the parents' attendance. *Id.*

In yet another speculation, Petitioners claim that families will relocate from one state to another depending upon who has the burden of proof in the administrative hearing. Petition, p.29. There is no basis for this claim. School officials are obligated to develop appropriate IEP because the IDEA requires them to do so, 20 U.S.C. § 1414(d), not because of some rule of evidence in a legal proceeding. Families move from one state to another, from one county to another, and even from one neighborhood to another, based upon the reputation of the school system. The school system in Montgomery County Maryland is nationally recognized as one of the country's premier school systems. Petitioners' assertion that families will move to the District of Columbia to take advantage of the burden of proof scheme in that locale is specious. Petition, p.29.

Petitioners contend that the burden of proof should be placed on school systems in all IDEA administrative proceedings to provide "an additional incentive" for compliance with the law. Petition, p.12. As the instant case illustrates, school systems already have such an incentive. If the school system is found not to have complied with the law, it will be required to fund the student's unilateral placement at the non-approved McLean School. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993); *School Comm. of Burlington v. Department of Ed. of Mass*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). In addition, the school system will be required to reimburse the parents for the attorney's fees that they have incurred. 34 C.F.R. § 300.513. Thus, the IDEA already contains "incentives" to ensure compliance with its provisions. Further, the notion that educators need the incentive Petitioners request is demeaning. Educators enter the profession to help students achieve, not to hinder their learning.

Petitioners claim that the remedial function of the IDEA will not be served unless the burden of proof is placed upon school systems in all instances. Petition, p.16. However, as the Court of Appeals noted, there are a number of remedial federal statutes whose functions are aptly served even when the burden of proof is on the party seeking the statutory protection. See App.8, referencing Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Notwithstanding this backdrop Petitioners states that the "special challenges" faced by students with disabilities warrants a special protection, albeit one not contained in the statute. As set forth below, however, Congress has already determined which special protections are necessary to effectuate the IDEA's purpose.

Congress' decision not to allocate the burden of proof to school systems in every administrative hearing is noteworthy given the variety of other rights afforded to parents under the IDEA. The IDEA is a comprehensive law that requires educational agencies to identify, evaluate and then provide a free appropriate public education to eligible children from birth through age 21. 20 U.S.C. § 1400, *et. seq.* There are numerous procedural and substantive provisions in the IDEA that protect children and parents.

By way of example, the IDEA mandates that parents be involved in decision making for their child throughout the educational process. Parents are members of the IEP team. 20 U.S.C. § 1414(d). Parents have the right to disagree with a school district's evaluation and request an independent evaluation at the school district's expense. 20 U.S.C. § 1415(b)(1). Parents have the right to inspect and review all education records in the possession of the school district related to the development of an IEP. 20 U.S.C. § 1415(b). A school system is required to provide parents with notice of an initial referral for evaluation; each IEP meeting; a reevaluation of their child; and upon registering a complaint. 20 U.S.C. § 1415(d)(1). The procedural safeguards notice must contain a full explanation of the procedural safeguards and be written in an "easily understandable manner" 20 U.S.C. § 1415(d)(2).

When there is a dispute, voluntary mediation is available. 20 U.S.C. § 1415(e). If parents request a hearing they have the right to counsel and to experts; the right to present evidence and cross-examine and compel the attendance of witnesses; and the right to a verbatim record of the hearing. 20 U.S.C. § 1415(h). The school system must provide parents with a list of free or low-cost legal services in their area. 34 C.F.R. § 300.507(a)(3). Parents must receive, at least 5 business days before a hearing, any evaluations the district will use in a hearing. 20 U.S.C. § 1415(f)(2). As noted, during the pendency of the administrative and judicial review process, the student is to continue to receive the previously agreed upon levels of service. 20 U.S.C. § 1415(j). Parents may be awarded attorney's fees if they prevail in those proceedings. 20 U.S.C. § 1415(i)(B).

The Fourth Circuit summarized the essence of the full panoply of educational protections and rights parents and children have under the IDEA:

> The IDEA and its implementing regulations require an open process that makes relevant information and special services, such as the independent evaluation, available to parents. By the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects. They have continuing access to information and anticipated evidence once a hearing is requested. In sum, Congress has taken into account the natural advantage a school system might in the IEP process, including the administrative hearing, by providing the explicit protections we have outlined. As a result, the school system has no unfair information or resource advantage that compels us to reassign the burden of proof to the school system when the parents initiate the proceeding.

App.11.

The myriad procedural protections afforded to children and parents in the IDEA further serves to ensure that a student's IEP is substantively appropriate. The IEP is the blueprint and "modus operandi" for providing a FAPE to disabled students. *School Comm. of Burlington v. Department of Educ. of Mass.*, 471 U.S. 359, 368, 105 S. Ct. 1996, 2001_02, 85 L. Ed. 2d 385 (1985). The IEP is also considered the "centerpiece of the [IDEA's] education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988). In *Rowley, supra*, the Court held that "adequate compliance with the procedures prescribed [by the IDEA] would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 102 S. Ct. at 3050. Accordingly, adherence to the IDEA's procedural protections also serves to ensure a substantively appropriate educational program, which is the ultimate goal of the statute. Allocating the burden of proof to the party requesting an administrative hearing does not undermine this goal.

Congress did not include the burden of proof among the many protections already afforded parents in the IDEA. As such, there is no reason to depart from the general rule that a party initiating a proceeding should bear the burden of proof.

B. Allocation of the burden of proof in IDEA administrative proceedings should be left to the states.

The IDEA has frequently been described as a model of "cooperative federalism." *Taylor v. Vermont Dept. of* Educ., 313 F.3d 768, 776 (2nd Cir. 2002); *Little Rock School District v. Mauney*, 183 F.3d 816, 830 (8th Cir. 1999); *Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 151 (3rd. Cir. 1994); *Town of Burlington v. Department of Education*, 736 F.2d 773, 783-84 (1st Cir. 1984), *aff'd sub nom. Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). As stated in *Taylor, supra*:

> The Act does not usurp the states traditional role in setting educational policy, however. Rather, it is left to the individual states to determine how to implement the statute's goals. *Burlington Dep't of Educ.*, 736 F.2d 773, 784 (1st Cir. 1984) ("'Cooperative federalism' in this context, then, allows some substantive differentiation among the states in the determination of which educational theories, practices, and approaches will be utilized for

> educating disabled children with a given impairment.") *aff'd sub nom. Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). ... **"It seems plain that the Congress drew the procedural and substantive contours of education for disabled children, but left the shading and tinting of the details largely to the states. States are responsible for filling in the numerous interstices within the federal Act through their own statutes and regulations."** *Burlington*, 736 F.2d at 785.

Taylor, 313 F.3d at 777. Emphasis supplied.

Pursuant to this model of cooperative federalism, the states retain the authority to promulgate substantive and procedural requirements that embellish existing rules or that speak to matters where the statute is silent. The IDEA is not a "one size fits all" statute. In enacting the IDEA, Congress left the states with ample room to develop their own rules and regulations regarding the free appropriate public education that is to be afforded disabled students. It would thus be inappropriate for this Court to impose a nationwide rule upon the states regarding the burden of proof at administrative hearings.

The individual states have enacted statutes and regulations to accomplish the "shading and tinting" of the IDEA referenced above. Perhaps the most significant substantive differentiation amongst the states lies in the level of educational benefit that must be provided to disabled students.

In *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court stated that the "intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Rowley*, 102 S. Ct. at 3043. "Congress sought primarily to identify and evaluate handicapped children and to provide them with *access* to a free public education." *Rowley*, 102 S. Ct. at 3048. Emphasis supplied.

The Court held that "the requirement that a State provide specialized educational services to handicapped children generates *no additional requirement* that the services so provided be sufficient *to maximize each child's potential* 'commensurate with the opportunity provided other children.'" *Rowley*, 102 S. Ct. at 3046. Emphasis supplied.

The Court concluded that, substantively, the IDEA's goal of providing a free appropriate public education is met where the disabled child is offered a program that is reasonably calculated to provide the child with "some educational benefit." *Rowley*, 102 S. Ct. at 3048.

Some states have opted to exceed the IDEA's "some educational benefit" requirement. For example, North Carolina's special education law has been construed as requiring that disabled children "should be given an opportunity to achieve [their] full potential commensurate with that given other children." *Harrell v. Wilson County Schools*, 58 N.C.App. 260, 265, 293 S.E.2d 687, 690 (1982). *See also, Burke County Board of Education v. Denton*, 895 F.2d 973, 983 (4th Cir. 1990) (recognizing higher North Carolina educational standard). Massachusetts requires the provision of special education programs that "assure the maximum possible development of a child with special needs." *Stock v. Massachusetts*, 392 Mass. 205, 211, 467 N.E.2d 448, 453 (1984). *See also, David D. v. Dartmouth School Committee*, 775 F.2d 411, 423 (1st Cir. 1985) (recognizing higher Massachusetts educational standard). New Jersey special education law requires "local school boards to provide educational services according to how the student can best achieve success in learning." *Bd. of Educ. of the East Windsor Regional School Dist. v. Diamond*, 808 F.2d 987, 992 (3d. Cir. 1986); *Geis v. Bd. of Educ. of Parsippany-Troy Hills*, 774 F.2d 575, 583 (3rd Cir. 1995) ("New Jersey imposes a higher standard of special education than that required by the Act.") Michigan special education law has also been held as requiring "something more than the basic federal minimum." *Barwacz v. Michigan Department of Education*, 674 F. Supp. 1296, 1304 (WD Mich. 1987).

Thus, as illustrated above, there is a significant variation between the states as to the substantive level of services that are afforded to children with disabilities. The IDEA does not preclude this variation. If the IDEA does not require a uniform national rule as to the substantive level of services to be provided, there is not, as Petitioners contend, "a manifest need for a uniform national rule on the burden of proof." Petition, p.29.

In fleshing out the IDEA's procedural components, a number of states have enacted laws that specifically address which party bears the burden of proof in administrative proceedings. The differentiation amongst the states regarding the burden of proof issue again reflects the cooperative federalism that animates the IDEA. In Georgia, allocation of the burden of proof is dependent upon the specific issue to be tried. Georgia special education law provides that:

> Generally, the [local school system/state-operated program] shall bear the burden of coming forward with the evidence and burden of proof at any administrative hearing to establish that the proposed IEP is appropriate and provides FAPE. If the parents propose a placement that is more restrictive than provided by an existing, agreed upon IEP, the parents shall bear the burden of establishing that the more restrictive environment is appropriate. Consistent with the provisions of Rule 160-4-7-.18(g)(2)(f)(5), in hearings which address the issue of whether a student's behavior in a disciplinary matter constitutes a manifestation of the students disability, the school system shall bear the burden of coming forward and the burden of proof. The ALJ shall retain the discretion to modify and apply these general principles to conform with the requirements of law and justice in individual cases under unique or unusual circumstances as determined by the ALJ.

Georgia Administrative Code, Rule 160-4-7-.18(1)(g)(8).

In Minnesota, in tuition reimbursement cases, the burden of proof is on the party seeking a finding of appropriateness as to that parties' proposed program. The Minnesota Education Code at Section 125A.091.16 provides that:

> The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the

> parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate.

In West Virginia, the burden of proof appears to be placed upon the school system in all cases. West Virginia law provides that:

> The burden of proof as to the appropriateness of any proposed action, as to why more normalized placement could/could not adequately and appropriately service the individual's educational needs, and as to the adequacy and appropriateness of any test or evaluation procedure, will be upon school personnel recommending the matter in contention.

West Virginia Board of Education Regulations, Section 126-16-8.1.11c.

Alabama requires its education agencies in due process hearings to "[a]ssume the burden of proof regarding the appropriateness of services proposed or provided." Alabama Administrative Code, Chapter 290-8-9-.8(8)(c)6(ii)(I). In Arkansas, at "the beginning of the hearing, the hearing officer shall determine which party bears the burden of proof in regard to the particular issues raised." Arkansas Education Department Regulations, Section 10.01.28.1. In the District of Columbia, the local education agency "shall bear the burden of proof, based solely upon the evidence and testimony presented and testimony presented at the hearing, that the action or proposed placement is adequate to meet the educational needs of the student." D.C. Mun. Regs. Title 5, § 3030.3.

Congress recently reauthorized the IDEA and on December 3, 2004, President Bush signed the Individuals with Disabilities Education Improvement Act of 2004 into law. In reauthorizing the IDEA, Congress once again declined to impose a burden of proof scheme upon the states. Instead, Congress elected to allow the states to decide how the burden of proof should be allocated in administrative hearings. Thus, Congress has consistently opted not to completely intrude upon the states' traditional authority to regulate their educational affairs. In areas such as the allocation of the burden of proof, the states retain the authority to promulgate their own rules. Accordingly, it would be improper for this Court to usurp the states' authority by imposing a blanket rule in this matter.

CONCLUSION

For all the foregoing reasons, the Petition should be denied.

Respectfully submitted,

Zvi Greismann
(Counsel of Record)
Montgomery County Public Schools
850 Hungerford Drive
Room 174
Rockville, Maryland, 20850
301-279-3549

Eric Brousaides
Reese & Carney, LLP
10715 Charter Drive
Columbia, Maryland 21044
301-621-5255

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No. 04-698

In The
Supreme Court of the United States

◆

BRIAN SCHAFFER, a minor by his parents and
next friends, JOCELYN and MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County
Public Schools, and the BOARD OF EDUCATION
OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND TWELVE OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

◆

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor General

CARLA R. COLLINS
ERIC A. GREGORY
COURTNEY M. MALVEAUX
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
Associate State Solicitors General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia

January 21, 2005

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TROY KING
Attorney General
Office of the Attorney General
Alabama State House
11 South Union Street,
Third Floor
Montgomery, Alabama 36130
(334) 353-3915

TERRY GODDARD
Attorney General
State of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-3333

THOMAS J. MILLER
Attorney General of Iowa
Office of the
Attorney General of Iowa
1305 E. Walnut, Hoover
Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-4419

G. STEVEN ROWE
Attorney General of Maine
State House Station 6
Augusta, Maine 04333
(207) 626-8800

THOMAS F. REILLY
Attorney General
of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101
(573) 751-3321

MIKE MCGRATH
Attorney General of Montana
Office of the Attorney General
P.O. Box 201401
Helena, Montana 59620-1401
(404) 444-2026

Attorney General
BRIAN SANDOVAL
Office of the Attorney General
Department of Justice
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1112

PATRICIA A. MADRID
Attorney General
of New Mexico
Office of the Attorney
General of New Mexico
407 Galisteo
P.O. Drawer 1508
Santa Fe, New Mexico
87504-1508

JIM PETRO
Attorney General
Office of the
Attorney General of Ohio
State Office Tower
30 E. Broad Street, 17th Fl.
Columbus, Ohio 43215
(614) 466-8980

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah
84114-2320
(801) 538-9600

DARRELL V. MCGRAW, JR.,
Attorney General
of West Virginia
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450, when parents of a disabled child and a local school district reach an impasse over the child's Individualized Education Program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the administrative hearing, which side has the burden of proof – the parents or the school district?

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INTEREST OF AMICI

The Commonwealth of Virginia, Commonwealth of Massachusetts, and the States of Alabama, Arizona, Iowa, Maine, Missouri, Montana, Nevada, New Mexico, Ohio, Utah and West Virginia ("States") receive federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 ("IDEA"). Consistent with the IDEA, the States require their local school districts to work to provide a free and appropriate public education for every disabled child in the school district. *See* 20 U.S.C. § 1412. Because every child is different, the school districts, in consultation with the disabled child's parents, must develop an Individualized Education Program ("IEP") for each disabled child. *See* 20 U.S.C. § 1412(a)(2). On occasion, the parents and the school district disagree on the content of the IEP. In those instances, either the parents or the school district may seek an administrative hearing. *See* 20 U.S.C. §§ 1414(a)(1)(D)(ii)(II), 1415(f). At the hearing, either the school district or the parents must bear the burden of proof. Unfortunately, the IDEA is silent on the issue of which side bears the burden of proof.

In urging this Court to grant the Petition, the States ask this Court to resolve the issue of which side bears the burden of proof in an administrative hearing. Quite simply, there must be a single national rule on this issue. As described below, the lack of a uniform rule has practical consequences, leads to inconsistent results within the same State, and inhibits interstate mobility.

However, in this brief, the States do not express an opinion on *how* the question should be resolved. If certiorari is granted, some States may file a brief arguing that the school districts should bear the burden of proof. Other States may file a brief contending that the parents should bear the burden of proof. Still other States may decline to take a position on the issue. Nevertheless, at this time, the States simply are saying that this Court should agree to decide the issue.

◆

SUMMARY OF ARGUMENT

The States' argument in favor of granting the Petition is threefold.

First, there is a deep and serious conflict among the Circuits. This conflict has enormous practical consequences. This deep and serious conflict on an issue of federal law is, by itself, sufficient reason for this Court to grant a Writ of Certiorari. Moreover, given that virtually all of the Circuits have addressed the issue, there is no possible benefit to deferring resolution of the question to a later time.

Second, the lack of uniformity leads to conflicting results within the same State. When IEP litigation takes place in state court, there is a risk that state courts will not follow Circuit precedent. Moreover, in those Circuits where there is no binding authority, the district judges are free to decide the issue as they see fit. The only way to avoid these conflicting results is for this Court to establish a uniform rule that is binding in both the state and the federal courts.

Third, the lack of uniformity inhibits the ability of citizens to relocate from one State to another State. In some cases, families may be swayed not to make moves, that are otherwise attractive to them, for fear of losing IDEA rights available to them in the Circuit where they reside. In other cases, families may be pressured into making moves, when they would prefer to remain in place, in order to leave Circuits where their IDEA rights are less than optimal. Both sorts of pressure are undesirable.

◆

ARGUMENT

I. THERE IS A DEEP AND SERIOUS CONFLICT AMONG THE CIRCUITS.

As noted by the Petition, there is a deep and serious split in the Circuits on the issue of allocating the burden of proof. Four Circuits – the Fourth, Fifth, Sixth, and Tenth – place the burden of proof on the parents. *See Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004); *Doe v. Board of Education of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986).[1] In contrast, six Circuits – the Second, Third, Seventh, Eighth, Ninth, and the District of Columbia – place the burden of proof on the school district. *See Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2nd Cir. 1998); *Clyde K. v.*

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[1] At first blush, it appears that *Alamo Heights* stands for the proposition that the party seeking to change the IEP must bear the burden of proof. However, as explained in more detail at page 19 of the Petition for Certiorari, other language in *Alamo Heights* mandates that the school district's view be presumed correct. Thus, the parents in the Fifth Circuit always bear the burden of proof.

Puyallup School District No. 3, 35 F.3d 1396, 1398 (9th Cir. 1994); *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3rd Cir. 1993); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985) (citation omitted). Indeed, only two Circuits – the First and Eleventh – have not addressed the issue.[2] *But cf. T.B. ex rel. N.B. v. Warwick School Cmte.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (Stating in dicta that the school district always bears the burden of proof.). *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1292 (11th Cir. 2001) (once an initial IEP is in place, the burden of proof is on the party that wishes to change the IEP).[3] As a result of this split, substantially different rules apply depending upon the State in which the dispute over the IEP arises. In eighteen States, the burden is placed on the parents.[4] Conversely, in twenty-five other States and the District of Columbia, the burden is placed on the school district.[5]

This conflict has enormous practical consequences. Although the IDEA is a single statute of nationwide application, compliance with that statute may be easier for some States than others – both financially and otherwise – based on the judicial Circuit in which they lie. In the 3,000 or so administrative hearings held each year under the IDEA, the role played by the burden of proof is self-evident. *See* Government Accounting Office, *Report to the Ranking Minority Member, Comm. On Health, Education, Labor and Pensions* 29 (Sept. 2003) (reporting 3,020 administrative hearings held in 2000). However, the significance of the burden goes far beyond these hearings. More than 6.5 million students have IEPs in place. *Id.* at 29-30. Each IEP is the result of a statutorily mandated process in which parents have a right to participate as well as a right to appeal any decision by the school district not to accommodate their requests. Knowledge that parents will bear the burden of proof, if no agreement can be reached, gives school districts in some Circuits a more advantageous posture than their counterparts in Circuits where the school district must bear that burden.

This clear split among the Circuits on an important issue of federal law is, by itself, sufficient reason for this Court to grant certiorari. Moreover, given that virtually all of the Circuits have addressed the issue, there is no possible benefit to deferring resolution of the question to a later time. Any decision by the First or Eleventh Circuit likely will simply track the reasoning of one of the other ten Circuits to address the issue. Certiorari should be granted.

II. THE LACK OF UNIFORMITY LEADS TO INCONSISTENT RESULTS WITHIN THE SAME STATE.

The lack of a uniform national rule designating which party bears the burden of proof leads to inconsistent results *within the same State*.

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[2] Because of the limited nature of the Federal Circuit's jurisdiction, 28 U.S.C. § 1295, the Federal Circuit cannot rule on the issue.

[3] Although *Devine* did not address the issue of who bears the burden of proof in a disagreement over an initial IEP, its holding is at odds with the broad language used by the Fourth Circuit, which appears to place the burden on the parents in all cases. *See Weast*, 377 F.3d at 456 ("[W]e hold that parents who challenge an IEP have the burden of proof in the administrative hearing.").

[4] States where the burden is placed on the school district include Alaska, Arkansas, Arizona, California, Connecticut, Delaware, Hawaii, Idaho, Indiana, Illinois, Iowa, Missouri, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Dakota, Vermont, Washington, and Wisconsin.

[5] States where the burden is placed on the parents include Colorado, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

First, the decision of an administrative hearing officer may be appealed to either a state court of competent jurisdiction or a federal district court. 20 U.S.C. § 1415(i)(2)(A). However, decisions of the Circuits interpreting federal law are *not* binding authority in state courts within those Circuits. *See United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (Explaining that "decisions of [the Supreme Court] on national law have binding effect on all lower courts whether state or federal," but that "because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts."). Thus, for example, the Virginia courts could disregard *Weast* and hold that the school district bears the burden, but the federal courts in Virginia are bound by *Weast*. The issue of who bears the burden of proof should not depend upon whether the appeal is filed in state court or federal court.

Second, there are seven States where there is no binding Circuit authority for the federal courts.[6] If a case is brought in federal court in one of these States, the district judge will decide.[7] Because the decisions of one district judge are not binding on other district judges, there is a distinct possibility of inconsistent results. For example, in a decision favorable to the school district, a judge of the District of Massachusetts ruled that "[t]he burden of proof *at all times* lies with Plaintiffs." ***Douglas W. v. Greenfield Public Schools***, 164 F. Supp. 2d 157, 164 (D. Mass. 2001) (emphasis added). Yet, in a decision favorable to parents, a *different* judge of the *same* court ruled that "the burden must rest with the [school officials] to show, by a preponderance of the evidence, that [the school district's] IEP provides [the child] with a 'free appropriate public education.'" *Lang v. Braintree School Committee*, 545 F. Supp. 1221, 1228 (D. Mass. 1982).[8] Thus, the choice of law in any given case in a State without binding Circuit authority may well depend upon which judge is assigned.[9]

The only way to prevent conflicts within the same State is for this Court to render a decision which is binding on all state and federal courts. Certiorari should be granted.

III. THE LACK OF A UNIFORM RULE HINDERS INTERSTATE MOBILITY.

This Court has "long recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (citation and internal quotation marks omitted). In deciding where to place the burden of proof in IDEA cases, neither the majority rule nor the minority rule – standing alone – implicates this important principle of federalism. However, the principle is most decidedly implicated by the *conflict* between the two rules.

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[6] These seven states are Alabama, Florida, Georgia, Maine, Massachusetts, New Hampshire, and Rhode Island.

[7] Of course, if the case is brought in state court, the issue will be controlled by whatever state court authority exists, if any.

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[8] The result in *Lang* is especially noteworthy because the district court imposed the burden on the school district even though it had prevailed at the administrative level.

[9] Of course, since the District of Massachusetts rendered these decisions, the First Circuit has declared, in dicta, that the school district always bears the burden. *See T.B.*, 361 F.3d at 82 n.1.

Because of the split in the Circuits, parents in some States have less rights under the IDEA than their counterparts in other States. Or, stated differently, school districts in some States have less demanding duties than the school districts in other States. Where a child suffers from a severe disability – or, perhaps, even a moderate one – these differences can predictably impact family decisions about whether to take up residence in another State.

Two examples illustrate the problem. First, suppose a family with a disabled child lives in Phoenix, Arizona, where, under *Clyde K.*, the burden of proof is on the school district. If the family were to move to Santa Fe, New Mexico to pursue better economic prospects, *Johnson* mandates that the parents would have the burden of proof. Thus, the parents would face a significant reduction in their rights under the IDEA if they were to make the move from Arizona to New Mexico. This fact may well inhibit the exercise of their constitutionally protected right to change their State of residence.

Second, suppose a family with a disabled child lives in Youngstown, Ohio, where, under *Tullahoma City*, the parents bear the burden of proof. Although comfortably settled in Youngstown and wishing to remain there, the parents may well be advised to pull up stakes and move to Pittsburgh, Pennsylvania, where, under *Oberti*, the school district bears the burden. Because the school district bears the burden, it may be easier for parents to obtain improved services for their child. Such a situation is likely to be troublesome to both the parents and their new school district. The parents may resent feeling compelled and forced to move in order to take full advantage of a federal law. School officials may also be concerned by the additional strain that such migration may impose upon their systems. Moreover, those left behind

– families without the means or opportunity to relocate – may understandably resent the unequal treatment that their disabled children receive as the result of this conflict.

All parents want what is best for their disabled children and for the entire family. The issue of whether the parents or the school district bear the burden of proof in an IEP administrative hearing should not be a factor in deciding whether to move to another State. A decision from this Court resolving the issue would eliminate it as a factor. Certiorari should be granted.

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CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be GRANTED.

Respectfully submitted,

JERRY W. KILGORE
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

MAUREEN RILEY MATSEN
Deputy State Solicitor
General

CARLA R. COLLINS
ERIC A. GREGORY
COURTNEY M. MALVEAUX
RONALD N. REGNERY
D. MATHIAS ROUSSY, JR.
Associate State Solicitors
General

January 21, 2005

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 371-0200 (facsimile)

Counsel for the Commonwealth of Virginia

(4)

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No. 04-698

In The

Supreme Court of the United States

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BRIAN SCHAFFER, a minor by his parents and
next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of
Montgomery County Public Schools, *et al.*,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The Fourth Circuit Court Of Appeals**

◆

REPLY BRIEF OF PETITIONERS

◆

WILLIAM H. HURD*
SIRAN S. FAULDERS
TROUTMAN SANDERS, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)
**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONERS

Nothing in the respondents' brief in opposition calls into question the need for this Court to review and reverse the decision below. Indeed, the more respondents' brief is studied, the more apparent it becomes that the petition should be granted. Additionally, a new decision by the Fourth Circuit, handed down after the petition was filed, affirms the sweeping rule adopted below, underscores the importance of the burden of proof and confirms the need to grant certiorari.

1. Respondents concede that "[t]he IDEA is silent as to which party bears the burden of proof in an administrative hearing brought under the IDEA." Br. in Opp. at 8.

2. Respondents fail to address – and, thus, implicitly acknowledge – key points that make this petition a worthy candidate for certiorari. For example:

(a) Respondents do not deny that the lower courts are deeply divided on which party bears the burden of proof, with six circuits adopting the rule favored by the petitioners and four favoring the contrary rule adopted by the decision below. *See* Pet. at 17.

(b) Respondents do not deny that the issue is an important one. While petitioners view the matter as one implicating civil rights, Pet. at 21, respondents insist that it be made a matter of States' rights instead. Br. in Opp. at 15. The fact that the parties view the same subject so differently is not, however, a reason to deny certiorari. *See infra* at 3.

(c) Respondents do not dispute the fact that this petition presents an ideal vehicle for resolving the issue. As the petitioners previously noted, (i) the split is mature,

(ii) the case is not cluttered by collateral issues, and (iii) the decision below – with its majority opinion and dissent by Judge Luttig – neatly frames the issue for resolution by this Court. See Pet. at 29. None of these points are challenged by the brief in opposition.

3. Respondents seek to highlight various factual findings made by the administrative law judge ("ALJ"); however, the question presented to this Court is strictly a legal one unaffected by such evidentiary matters. Moreover, after twice reviewing the evidence in detail, the ALJ twice concluded that resolution of the case depends on which side bears the burden of proof. App. 144 (first hearing); App. 70, 105, 109 (second hearing).[1] Indeed,

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[1] Consistent with the pivotal role played by the burden of proof, the findings respondents cite are largely drawn from the ALJ's *initial* opinion, when the burden of proof was on the parents. Many of the key initial findings were not repeated in the ALJ's second decision, when the burden of proof was placed on the school district.

Other assertions by respondents are simply misleading. While not relevant to the outcome of this petition, they constitute an unfair attempt to cast the parents in an unfavorable light and thus warrant a brief response. For example:

- Respondents correctly note that the parents did not visit the program offered by the school district at Hoover Middle School. Br. in Opp. at 2. Yet, they neglect to mention that Brian's mother did visit the supposedly more favorable program offered by the school district at Frost Middle School. App. 89, 134-35. Since Mrs. Schaffer found the program at Frost to be inadequate, there was no need to visit Hoover.
- Similarly, respondents correctly note that the parents paid a $750 fee to the McLean School in March of 1998, before the disputed IEP was developed. Br. in Opp. at 1-2. Yet, they fail to mention that this fee did not commit the parents to send Brian there or to pay the year's tuition. The purpose was simply to "reserve a place" for Brian at that school, App. 82, thereby preserving their options.

respondents candidly acknowledge the critical role played by the burden of proof, conceding that the ALJ reversed his initial decision and ruled for the parents "[b]ased solely on the reallocation of the burden of proof ordered by the district court." Br. in Opp. at 6. This concession demonstrates both the importance of the burden and the appropriateness of this case as a vehicle for deciding where it should be placed.

4. Unable to challenge the appropriateness of certiorari, respondents retreat into a misplaced argument on the merits of the decision below. Mechanically restating the position of the Fourth Circuit, respondents contend that "there is no reason to depart from the general rule that a party initiating a proceeding should bear the burden of proof." Br. in Opp. at 15. Yet, as Judge Luttig explained in his dissent, the reasons to depart from such a rule are compelling. *See* App. 16. Nowhere do respondents mention – much less refute – Judge Luttig's analysis. Even more important at the petition stage is the fact that the split decision in the panel illustrates the deep division among the circuits. Certiorari should be granted so that the error may be corrected – wherever it lies – and a uniform national rule established.

5. Respondents also argue that no uniform rule is needed and that the States should be allowed to allocate the burden of proof however they wish. Br. in Opp. at 15. This argument is also misplaced.

(a) Respondents' position contrasts sharply with the position taken by the thirteen States that have made known their views on this petition. *See* Brief of the Commonwealth of Virginia and Twelve Other States as Amici Curiae in Support of the Petitioners. Drawn from all parts of the Union, these States are emphatic in their view that "there must be a single national rule" on which party bears the burden of proof in an IDEA administrative hearing. *Id.* at 1.

(b) Respondents note that four States plus the District of Columbia have adopted regulations allocating the burden of proof in IDEA cases. Br. in Opp. at 18-20. Yet, they point to no statute or regulation where their *own* State – Maryland – has attempted to allocate the burden. Even if States were vested with discretion on this issue, there would still be a need for a federal rule assigning the burden of proof in cases, such as the one at bar, where that discretion has not been exercised.

(c) Where a State has adopted a regulation placing the burden of proof on the school district, it may be best viewed as a concession by the State as to what is required by federal law. Alternatively, it may be viewed as an attempt by the State to support parents whether or not federal law requires it. In neither event does such state action suggest that States are free to impose the burden on parents instead. To the extent that any State may now be doing so, it is yet another reason for this Court to grant certiorari and review the issue.

(d) The decision by the Fourth Circuit was based on its interpretation of *federal* law, not state law. The same is true of the decisions by the district court and the ALJ. The same is true of the decisions by the other circuits that have allocated the burden of proof in IDEA cases. While the circuits are divided in how they allocate the burden, none have suggested that it is a matter of state discretion. If there were any merit in respondents' claim that state law should govern, the fact that such a view has gained no credence among the circuits would be yet another argument in *favor* of review by this Court.

6. In a case decided after the petition was filed, the Fourth Circuit has confirmed the broad holding of the decision below. In *JH v. Henrico County School Board*, No. 04-1454, 2005 U.S. App. LEXIS 1024 (4th Cir. Jan. 20, 2005), the school district unilaterally *changed* an IEP, cutting dramatically the level of therapy provided to a child with autism.[3] Reversing the hearing officer, who had placed the burden on the school district, the Fourth Circuit said the parents must bear the burden. The court explained its decision by invoking the case that is the subject of this petition:

> In *Weast*, we held that, under the IDEA, parents, not the school system, bear the burden of proof in a state administrative proceeding initiated by

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[3] *JH* illustrates the difficulties parents often face in dealing with local school districts. There the school district unilaterally cut the child's speech/language and occupational therapy by 90 percent. *See JH*, Supplemental Joint Appendix at 87 (decision of hearing officer).

While a school district may not change a child's current "educational placement" without an agreement or adjudication, 20 U.S.C. § 1415(j), this term is not defined by statute. Courts have held that an "educational placement" is changed only if there has been "a *fundamental* change in, or *elimination* of, a basic element of the educational program." *E.g., Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1122 (10th Cir. 1999); *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992); *Spilsbury v. District of Columbia*, 307 F. Supp. 2d 22, 27 (D.D.C. 2004) (emphasis added). Thus, the school district may sometimes circumvent the restriction by claiming that a reduction or change in services is not "fundamental," thereby forcing the parents to acquiesce or initiate legal action.

> the parents to challenge the substantive adequacy of an IEP.

Id. at *26, n.7. So important was the burden of proof to the outcome that the court was unable to reach a final judgment and remanded the case all the way back to the hearing officer so that he could review the evidence in light of the new standard.

Thus, as far as the Fourth Circuit is concerned, it does not matter whether the dispute involves an initial IEP or a school district's unilateral change to a previously-agreed IEP. If the parents challenge the school district, they bear the burden of proof. By thus placing the burden on the parents, the rule adopted by the Fourth Circuit conflicts sharply with the rule followed by six other circuits – and by the Supreme Court of New Jersey – where the burden is placed on the school district. *See* Pet. at 17. It is a conflict this Court should resolve.

◆

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

BRIAN SCHAFFER, a minor,
by his parents and next friends,
Jocelyn Schaffer and
Martin Schaffer;
JOCELYN SCHAFFER; and
MARTIN SCHAFFER

WILLIAM H. HURD*
SIRAN S. FAULDERS
TROUTMAN SANDERS LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)
**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

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IN THE

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BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, *ET AL.*,

Petitioners,

v.

JERRY WEAST, SUPERINTENDENT OF MONTGOMERY COUNTY PUBLIC SCHOOLS, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF VARIOUS AUTISM ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BETH T. SIGALL
THE LAW OFFICE OF BETH T.
SIGALL, PLLC
969 North Potomac Street
Arlington, VA 22205-1649
(571) 215-3435

GREGORY A. CASTANIAS
(*Counsel of Record*)
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amici Curiae

THOMAS F. URBAN II
LAW FIRM OF THOMAS F.
URBAN II, PLLC
2867 S. Abingdon Street
Arlington, VA 22206
(703) 861-5235

Counsel for Amicus Curiae Parents for Autistic Children's Education (PACE™)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof—the parents or the school district?

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STATEMENT OF INTEREST*

The Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400 *et seq*., provides federal money to assist state and local agencies in educating children with handicaps. To qualify for this program of federal assistance, a State must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all eligible children the right to a "free appropriate public education" tailored to the unique needs of the child by means of an "individualized educational program" (IEP). *See* 20 U.S.C. § 1412(a)(2), (4). The model for the creation of an IEP is a collaborative decision-making process between schools and parents, *see, e.g.*, 34 C.F.R. § 300.501(a)-(c) (2004), but when the parties reach an impasse, the parents may request "an impartial due process hearing" to resolve the matter. *See* 20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. §§ 300.507-.512 (2004).

The IDEA's definition of "children with disabilities" includes, among its categories, children with autism. 20 U.S.C. § 1401(3)(A). Children with autism are unquestionably the fastest-growing segment of the IDEA-covered population: In 1993, the number of children diagnosed with autism, and thus covered by the IDEA, was approximately 20,000; by 2002, that number had increased sixfold, to almost 120,000. United States Government Accountability Office, *Report to the Chairman and Ranking Minority Member, Subcommittee on Human Rights and Wellness, Committee on Government Reform, House of*

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* No party other than *amici* and their counsel authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Both parties have granted consent to the filing of this *amici curiae* brief. Letters of consent are on file with the Clerk of the Court.

Representatives: Special Education, Children with Autism, GAO-05-220 at 17 (Jan. 2005).

Amici, listed below in alphabetical order, are nonprofit organizations dedicated to promoting and supporting the interests of children with autism and their families. The mission of *amicus* Autism Society of America, Northern Virginia Chapter (ASA-NV) is to promote lifelong access and opportunity for all individuals with autism and their families, in an effort to enable them to be fully participating members of their communities. Education, advocacy at state and federal levels, active public awareness and the promotion of research all form the cornerstones of ASA-NV's efforts to carry forth its mission. The growing membership base of ASA-NV encompasses a broad and diverse group of parents, family members, special education teachers, administrators, medical doctors, therapists, nurses and aides, as well as countless other personnel involved in the education, care, treatment and support of individuals with autism in the Northern Virginia area, which has one of the fastest growing populations of children with autism in the United States. Recognizing and respecting the diverse range of opinions, needs and desires of this group, ASA-NV embraces an overall philosophy which chooses to empower individuals with autism, their parents or caregivers, in order to enable them to make choices best suited to the needs of the person with autism. This brief is being filed with the full support and approval of the Autism Society of America.

Amicus Parents for Autistic Children's Education (PACE™) is a not-for-profit membership organization that is open to parents and guardians of children with autism or similar disorders in the Northern Virginia area. PACE™ advocates on behalf of children with autism and their families for high-quality, effective, and scientifically based educational programs and to ensure school-system compliance with the IDEA. In doing so, PACE™ seeks to educate parents, the public, and governmental leaders on a wide range of issues related to the special needs of these children and, since its founding, has represented over 300 families who have children with developmental disabilities. Among other accomplishments, PACE™ was instrumental in developing an Applied Behavior Analysis (ABA) pilot program for preschool children with autism in Fairfax County in 1998; more recently, in 2003, it proposed the establishment of Virginia's first charter school for children with autism.

Amicus Parents Of Autistic Children of Northern Virginia (POAC-NoVA), Inc., is a non-profit membership organization that works to improve the quality and quantity of education for students with autism within the Fairfax County Public School (FCPS) system and surrounding area. In addition to monthly support groups covering many topics related to special education issues as well as an active internet support system, POAC-NoVA hosts workshops throughout the year providing access to expert therapy and teaching curriculum for autism and related disorders. Attendance is typically representative of every major school system in the Washington, D.C. Metropolitan Area, and the workshops often qualify for teacher recertification credit due to POAC-NoVA's constant school advocacy. POAC-NoVA's recent school advocacy efforts were largely responsible for the Fairfax County (Virginia) School Board's approval of the new, enhanced autism program for an estimated 600 students with autism in the pre-school through elementary grades starting with the 2004-2005 school year, including an unprecedented $3 million allocated for hiring and training additional educators specifically for this new program. POAC-NoVA continues to be a primary non-profit organization working with the FCPS staff to ensure that parental concerns for the new enhanced autism program are heard and understood.

Amicus Unlocking Autism (UA) is a not-for-profit organization founded primarily for the purpose of increasing awareness about autism. Through awareness, UA strives to help those on the autism spectrum reach their greatest potential in leading fulfilling and productive lives in relationships, society and employment. UA seeks to increase society's ability to work with and understand people with autism, as well as to raise funds for critical biomedical and behavioral research into autism. In an effort to increase public awareness of autism, in 1999 UA launched the "Open Your Eyes" project, which is a collection of photographs of children with autism designed to put a real face on the disorder. For parents of children with autism, UA provides information about biomedical treatment, behavioral therapies, pending legislation and existing laws. In addition, UA has developed an international network of parents and professionals to assist the parents of newly diagnosed children in finding available resources and support in their immediate area.

Because the Court's decision in this case will have profound effects on how IEP disputes between parents and schools will be resolved, *amici* and the constituencies they represent and support have a special interest in participating in the debate over where the burden of proof should lie in IEP proceedings. In addition, *amici* hold a special position in the community of individuals served and affected by the IDEA, and are uniquely suited to provide the Court with what *amici* believe will be helpful insights into the daily lives of families dealing with the special challenges of autism.

SUMMARY OF ARGUMENT

I. The allocation of the burden of proof in the IEP due process hearing goes to the very heart of IDEA's mandate that children with disabilities be provided a "free appropriate public education." The holding of the panel majority in the Fourth Circuit—which simply allocated the burden of proof upon the party seeking relief—did not properly take account of basic notions of policy and fairness inherent in both the allocations of burdens and the provision of special education. This Court's own pronouncements on the special role of the

IDEA, its objectives and its history, and the general allocation of burdens in focused statutory settings, counsel a functional interpretation of the Act in line with the stated Congressional objectives and the overall mission of the statute. *Amici* urge that the burden of proof in an IEP due process hearing should be placed squarely upon the party with the exclusive means of knowledge, the ability to efficiently advance judicial review proceedings, and statutory obligation to realize the objectives of the Act, which is the school system.

II. This result also acknowledges the realities of raising a child with autism. Children with autism have been characterized as "precisely the children IDEA seeks to protect and who states and localities should serve." *See* President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* 30 (2002) (available at http://www.ed.gov/inits/commissionsboards/whspecialeducation) (hereinafter "*President's Commission*"). As the fastest-growing and most widely diagnosed developmental disability in the nation—affecting 1 in every 166 children—it is still one of the least-understood childhood impairments, leaving parents and families of children with autism to face a number of difficult realities unique to raising such a child. From differential diagnoses to fleeting windows of opportunity for learning essential skills, raising a child with autism imposes upon parents the duty to educate themselves, advocate for better understanding and education, and sustain a functioning family in the face of constantly escalating strains on their time, energy, and finances. Allocating the burden of proof to school districts will sensibly, and equitably, contribute to furthering the Congressional design while avoiding the allocation of an additional, legal burden to parents with plenty of non-legal ones to carry.

ARGUMENT

I. THE STATUTORY REQUIREMENTS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, ITS SPECIFIC GOALS, AS WELL AS BASIC CONSIDERATIONS OF POLICY, CONVENIENCE, AND FAIRNESS, ALL COMPEL THE CONCLUSION THAT THE BURDEN OF PROOF IN IEP PROCEEDINGS SHOULD BE PLACED ON THE SCHOOL SYSTEM

The choice before this Court—whether the burden of proof in IEP proceedings should be placed on the school or on the parents—could be reduced to an abstract, academic debate. But for *amici*, their members, and the constituencies they serve, the issue in this case is anything but academic. Rather, it goes straight to the heart of IDEA's guarantee that all children, including those with autism or other disabilities, will receive a "free appropriate public education" from the schools in their communities. And, as Section II, below, amplifies, if the burden were put upon the parents, as the Fourth Circuit's decision did here, the decision would have profound effects on the ability of these parents, already burdened by the special demands of raising a child with autism, to ensure that the schools provide their children with that appropriate education.

In this case, the panel majority in the Fourth Circuit gave dispositive weight to the notion that when "a statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." Pet. App. 6 (citing 2 J. Strong, *McCormick on Evidence* § 337, at 411-12 (5th ed. 1999)). Though this is often stated as an "ordinary rule" or a "default rule," *see, e.g., Campbell v. United States*, 365 U.S. 85, 96 (1961), it is equally well recognized that "other factors such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." Pet. App. 6 (citing 2 *McCormick on Evidence* § 337). These other factors were not appropriately weighted by the panel majority in the Court of Appeals.

Indeed, the so-called "default rule" of having the burden of proof follow the burden of pleading has been widely criticized. In Bruce L. Hay, *Allocating the Burden of Proof*, 72 Ind. L.J. 651 (1997) (cited in 2 *McCormick on Evidence* § 337, at 411 n.1), Professor Hay cautioned against blind adherence to the default rule of "plaintiff bears the burden," pointing out that many of the policy considerations that are regularly offered in support of the default rule can be used equally to support a "defendant bears the burden" rule. *See id.* at 656-57 ("It will not do, therefore, to argue that the burden of proof should be placed on the plaintiff because she is the one responsible for putting the legal machinery into motion. That criterion gives as much support for the opposite allocation."). The McCormick treatise itself embraces this critique, observing: "[L]ooking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof . . . reference to which party has pleaded a fact is no help at all . . . in a case of first impression." 2 *McCormick on Evidence* § 337, at 411-12.

That is undoubtedly why this Court has itself recently recognized that "[n]o 'single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) (citing 9 J. Wigmore, *Evidence* § 2486, at 288 (J. Chadbourn rev. ed. 1981)) (revisions in opinion). Rather, the allocation of the burden of proof must be made with a special sensitivity to the goals of the law in question, as well as policy considerations.

In the context of the IDEA, these goals and policies lead to the conclusion that the burden of proving that an IEP will provide the statutorily mandated "free appropriate public education" should be allocated to the school district responsible for providing that appropriate education. Several reasons, independently and collectively, compel this conclusion.

First, placing the burden of proof on the school district is more consistent with the special procedural context and operation of the IDEA. That Act establishes the IEP process as a joint and collaborative effort between school systems on the one hand, and parents and children on the other. *See, e.g.*, David M. Engel, *Law, Culture, and Children With Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 170 (describing the IEP process as "controlled interaction between parents and educators") (citing H.R. Conf. Rep. No. 94-664, 94th Cong., 1st Sess. 43 (1975)). The goal is not for one side or the other to "win," but to reach a positive result for the child's education. *See, e.g., Lascari v. Bd. of Educ. of Rampo-Indian Hills Reg'l High School Dist.*, 560 A.2d 1180 (N.J. 1989).

In *Campbell v. United States*, 365 U.S. 85 (1961), this Court addressed the allocation of burdens in the analogous context of non-adversarial proceedings mandated by statute. There, the trial court conducted a mandatory hearing without the jury present to determine whether a government "Interview Report" qualified as a "statement" required to be produced to the defendant under the Jencks Act, 18 U.S.C. § 3500. The district court placed on the criminal defendants the burden of subpoenaing the government investigator as "their witness" in order to support their request for the Interview Report. This Court rejected that allocation of the burden and held that, because of the non-adversarial nature of this proceeding, "the emphasis on the petitioners' burden to produce the evidence was misplaced." 365 U.S. at 95.

> The function of prosecution and defense at the inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. ... The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce "statements" which the statute requires to be produced.

Id. Placing the burden on the government—even though it was not the moving party in the hearing—was considered proper because "the interest of the United States in a criminal prosecution . . . is not that it shall win a case, but that justice shall be done." *Id.* at 96 (internal quotation marks omitted).

Viewed in the light shed by *Campbell*, it would similarly be appropriate to put the burden of proof in IEP due process hearings on the school, whose interest, much like the government's interest in *Campbell*, is that a "free appropriate public education" "shall be done." Indeed, the school is assigned the affirmative obligation to provide that education in exchange for federal funding. *See* 20 U.S.C. § 1412(a)(1); Pet. App. 16 (Luttig, J., dissenting). In this situation, just as in *Campbell*, the party imposed with the statutory obligation—and given the means to meet that obligation—should bear the burden of proving that it indeed satisfied that obligation.

Second, placing the burden of proof on the school districts is more consistent with the goals of the Act, as illuminated by its history. The passage of the Education for All Handicapped Children Act, the precursor to the IDEA, "followed a series of landmark court cases establishing in law the right to education for all handicapped children." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982); S. Rep. No. 94-168, at 6, *reprinted in* 1975 U.S.C.C.A.N. 1425, 1430. The two "landmark" cases, *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 881 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279, 305 (E.D. Pa. 1972), explicitly held that the Due Process and Equal Protection Clauses required school districts to bear the cost burden of providing an education, and the burden of proof in justifying an education, for all handicapped children. *See Mills*, 348 F. Supp. at 881, 882 (holding that "Defendants [the school system] shall bear the burden of proof as to all facts and as to the appropriateness of any disposition" or placement in the due process hearings ordered by the court's injunction); *Pennsylvania Ass'n for Retarded Children*, 343 F. Supp. at 305 (placing "the burden of going forward with the evidence" on the school district). These watershed cases not only served as the impetus for the Act, but outlined its eventual contours as well. *See* S. Rep. No. 94-168, at 6, *reprinted in* 1975 U.S.C.C.A.N. at 1430. The history of the IDEA thus demonstrates Congress's intent that "a State remains responsible for providing an appropriate education designed to meet the specific needs of the handicapped child at no cost to that child's parent." *Id.* at 10, 1975 U.S.C.C.A.N. at 1434. Since Congress sought to "incorporate[] the major principles of the right to education cases" through the Act, *id.* at 8, 1975 U.S.C.C.A.N. at 1432, it follows that placing the burden of proof on the schools is likewise more consistent with the Congressional intent behind that Act.

Third, placing the burden of proof on the schools is more consistent with the well-regarded policy of placing the burden of proof on the party with the "peculiar means of knowledge." *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 494 n.17. This Court has routinely stated that "the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell*, 365 U.S. at 96 (citing *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957)). The IDEA explicitly recognizes that the school district, with its repeated experience in formulating IEPs, its recourse to the child-study team, and its access to experts and cumulative data, has special and particular knowledge and expertise needed to formulate an IEP. Early in the IEP process, detailed disclosure must be made by the district regarding the basis of its decisions, on the presumption that they hold the knowledge underlying the decisions that affect the child. *See* 34 C.F.R. § 300.503 (2004) (mandating detailed disclosure of explanations for IEP actions). And even though the IEP process is ideally an interactive and cooperative one with the parents, it nonetheless does not permit the parents to have access to school district information on certain issues of "teaching methodology, lesson plans, or coordination of service provision, ... [nor] preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting." 34 C.F.R. § 300.501(b)(2) (2004). The schools thus have exclusive access to the important information about historical ex-perience, while the parents may be left with, at best, an inchoate belief that a certain plan is not right for their child—and no opportunity to test that belief by comparison to the facts of prior experience, in the first instance. These exclusive activities of school personnel serve to underscore and enhance the relative superiority of the district throughout the IEP process.

Not only does the school have superior information and expertise; their representatives also dominate the IEP team. The regulations (34 C.F.R. § 300.344 (2004)) prescribe that the IEP team shall be made up of (at least) one regular education teacher of the child, one special education teacher of the child, a qualified and knowledgeable representative of the public agency, and an individual who is capable of interpreting "the instructional implications of evaluation results"—along with the parents of the child and a "parent representative." *Id.* § 300.344(a)(1)-(5). The parents are thus decisively outmanned by their "teammates"—not just in numbers, but in expertise, in training, in time, and in resources. One commentator describes the "team" thusly:

> The parents are outnumbered and surrounded at the big table by the professionals. Members of an ongoing team with its own internal dynamics, the professionals are more reluctant to oppose one another than to oppose the lone "outsider." Parents are inherently suspect because of their emotional attachment to the child, and [IEP team] members assume that parental preferences reflect subjective rather than objective judgments. Since more is at stake for them than for anyone else at the table, parents generally are anxious and inarticulate. They are often less educated than other [IEP team] members and are non-conversant in the technical language or concepts used during the meeting.

Engel, 1991 Duke L.J. at 193-94 (citing Singer & Butler, *The Education for All Handicapped Children Act: Schools as Agents of Social Reform*, 57 Harv. Educ. Rev. 125, 142 (1987)). Thus, because the school districts are comprised of educational experts, who are repeat players in the IEP process and who have access to a broad spectrum of information about other IEP plans that have worked (or not), it is especially appropriate to allocate the burden of proof to the school districts. *See, e.g., Alaska*, 540 U.S. at 494; *Concrete Pipe & Prods. of Cal. v. Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993).

Fourth, placing the burden on the school system leads to the efficient use of judicial time and resources by creating desirable incentives for school districts to articulate and communicate their educational practices. The IDEA admittedly grants significant deference to the educational preferences of school districts "on issues such as teaching methodology, lesson plans, or coordination of service provision." 34 C.F.R. § 300.501(b)(2) (2004). But the reason schools get this deference—their expertise—is itself a compelling reason for allocating the burden to the schools in the first instance. It will not be burdensome at all for these educational experts to come forward in the first instance with evidence and explanations for the IEP plan they have proposed. That regime would have several salutary benefits: For one, it will allow the parents to better sharpen the focus of their sides of the case by addressing the school's showings, in turn focusing and streamlining the hearing itself. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (the burden of proof should be allocated in a way that "help[s] control the presentation of evidence at trial"). For another, allocating the burden to the school districts will "encourag[e] voluntary compliance by giving [the schools] incentives to self-report and to keep adequate records in case of dispute." *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15 (2000) (placing the burden of proof on taxpayers in tax claims). It will also lessen the *in terrorem* effect that the adversarial IEP process works on the already-overwhelmed parents of children with handicaps, and empower parents to be better and fuller participants in their children's education.

Fifth, placing the burden of proof on the school districts in the due process hearings effectively "handicap[s] a disfavored contention" bearing on important public concerns. *See* 2 *McCormick on Evidence* § 337, at 413. Courts have employed this presumption when facing statutes that are enacted to achieve a particular public purpose, but silent as to burdens of proof in enforcing that purpose. For instance, in the *Regional Rail Reorganization Proceedings*, 421 F. Supp. 1061 (Special Court 1976), the court considered the viability of employee pension plans under the Regional Rail Revitalization and Regulatory Reform Act of 1976. Recognizing that the Act was enacted for the public purpose of "protecting all those employees and beneficiaries of the bankrupt railroads who were unlikely to be financially secure without pension aid," Judge Wisdom, writing for the Special Court, considered ConRail's position that certain plans were invalid as a "disfavored" position, and thus allocated the burden of proving invalidity on ConRail. *Id.* at 1073. An alternative holding, the court explained, would allow ConRail to protect itself, "where Congress obviously wanted [it to protect] the average worker or beneficiary. *Id.* So too here: Congress "obviously wanted" to protect disabled students (by ensuring them an "appropriate free public education"), and since school districts, if "[l]eft to [their] own devices," will "choose the educational option that will help it balance its budget," rather than the one best suited to the child's individual needs, *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (6th Cir. 2004), the schools' self-interest is appropriately "disfavored" by allotting the burden of proof to them, rather than to parents.

Sixth and finally, placing the burden of proof on the school districts in the due process hearing gives proper consideration to the realities facing parents of children with disabilities. Detailed in Section II, below, are many of the specific realities of daily life in the families of children with autism. Those burdens, coupled with a parent's responsibilities under IDEA, are plenty: Under IDEA, parents are to be collaborative partners with the schools and an individualizing force behind structuring a child's education program. *See, e.g.*, 34 C.F.R. §§ 300.501(a)(1), 300.501(a)(2), 300.504, 300.505 (2004). The job of the schools, however, is to actually provide that "appropriate" education program, so it is far more appropriate that the schools bear the burden of establishing the propriety of that program. The Court should not saddle the already-burdened parents of children with disabilities with the additional legal burden of proving that such a program is educationally inappropriate, especially when there are professional educators who will be repeat players, and who can better frame, focus, and carry such a burden at due process hearings. Otherwise, the parties who Congress intended to benefit from IDEA would instead find themselves only burdened, and appreciably so, by the operation of that statute.

II. THE SPECIAL CHALLENGES OF PARENTING A CHILD WITH AUTISM HELP TO DEMONSTRATE WHY SCHOOLS, NOT PARENTS, SHOULD BEAR THE BURDEN OF PROOF IN IEP DISPUTES

In the world of special education, parents are *the key* to child success. *See President's Commission*, at 38. Nowhere is this statement more true than in the case of parenting a child with autism.

"Autism" generally describes a developmental disorder which challenges a child's ability to communicate and interact socially. According to the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. 2000) ("DSM-IV"), autism includes a wide spectrum of symptoms and degrees ranging from mild to severe. *Id.* at 70-71. But regardless of the severity of the condition, autism has three basic components: communication problems, gross and sustained impairment in social interactions, and unusually restricted and repetitive patterns in behavior, interests, and activities. *Id.* For example, a child with a profound autistic disorder may have great difficulty even communicating at a basic level, while a child with Asperger's Disorder, which falls within the autism spectrum, may have little difficulty communicating, but great difficulties in social interactions. As a result, "[t]here is no single best treatment package for all children with [autism]." *See* National Institute of Mental Health, National Institutes of Health, Brochure No. 04-5511, *Autism Spectrum Disorders (Pervasive Developmental Disorders)* (2004), at 8 (available at http://www.nimh.nih.gov/publicat/autism.cfm) (hereinafter "NIMH, *Autism Spectrum Disorders*").

Being a parent under any circumstance is difficult (if nonetheless rewarding). But parents of the children covered by IDEA have additional challenges. In the particular case of parents of children with autism, for example, the parents have to educate themselves about the condition itself, its various treatments, and its prognoses, just to adequately raise their children. This task is made more difficult by the fact that autism comes in many forms, and the precise type and severity of the autism disorder may not make itself fully known for years after onset of recognizable symptoms. *See* P.A. Filipek *et al.*, *Practice Parameter: Screening and Diagnosis of Autism, Report of the Quality Standards Subcomm. of the Am. Academy of Neurology and the Child Neurology Society*, 55 Neurology 468, 471 (2000).

Even with a certain diagnosis, the medical community does not speak with one voice with respect to the proper treatment of the condition: "It can be confusing and overwhelming to hear about all of the different treatments for children with [autism]. . . . [T]he history of treating children with [autism] also is riddled with eccentric, faddish, expensive care that is later shown to be needless or without merit." Kenneth E. Towbin, *Autism Spectrum Disorders*, in *When Your Child Has a Disability* (Mark L. Batshaw, M.D. ed., 2001), at 349. "Even the most experienced highly trained professionals can find it difficult to sort through the claims and evidence about treatments for autism. For families who may know nothing about autism at the moment someone applies the label to their young child, the task can seem overwhelming." Gina Greene, *Evaluating Claims About Treatments for Autism*, in *Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals* 16-17 (C. Maurice ed., 1996). This only highlights the critical need for parents to educate themselves sufficiently in order to make considered and informed decisions about the course of their child's treatment and education. *See* Benedict Carey, *Autism Therapies Still a Mystery, But Parents Take Leap of Faith*, N.Y. Times, Dec. 27, 2004.

Still, when a child is first diagnosed as having autism, most parents "discover, to [their] surprise, just how scarce the resources are for parents ... how thin the knowledge" is, and how varied the theories and guesses are as to autism's cause, components and treatment. Bob Wright, *I Want My Grandson Back*, The Today Show, Feb. 25, 2005 (available at http://www.msnbc.msn.com/id/7024923/). They may find it hard to comprehend that "a disorder with the frequency of autism commands so little public attention and such meager resources devoted to research, [certainly] compared to other, less common childhood disorders." *Id.* Research for childhood cancers, muscular dystrophy, juvenile diabetes, and cystic fibrosis—all of which combined together are less common than autism—is collectively funded to the tune of over $500 million annually, while autism research receives only $15 million per year from private sources. *See id.* It is thus unsurprising that parents of children with autism almost inevitably find themselves adding to their already awesome parental role by taking on the job of advocate—building awareness, raising funds for medical research, and advocating social and educational opportunities, among other things. *See* Robert Bazell, *Parents Push for Autism Cure; Doctors Credit Parents for Making Research a Priority*, MSNBC, Feb. 23, 2005 (available at http://www.msnbc.msn.com/id/7012176/).

With rare exceptions, no disability claims more parental time and energy than autism. Teaching a child with autism even the simplest tasks is highly time-and-effort intensive; managing the child's challenging behavior requires unflagging vigilance; and, perhaps most painfully, coping with an autistic child's seeming indifference to loving overtures can be discouraging to a committed parent. *See generally* Douglas Moes, *Parent Education and Parenting Stress*, in *Teaching Children With Autism* 80-81 (R. Koegel & L.K. Koegel eds., 1995). One of the few universally agreed-upon notions in treating autism, however, is that constant parental involvement is crucial to the success of the child. Towbin, *Autism Spectrum Disorders*, at 351 ("parents are the most important resource for learning about other people and for fostering social interactions. . . . [they] are crucial for implementing treatment programs and for being advocates for [their] child's educational placement and other needs"); NIMH, *Autism Spectrum Disorders*, at 9 ("[p]arental involvement has emerged as a major factor in treatment success").

A recent article by a *New York Times* writer about his son (a child with autism) illustrates many of these basic challenges. John O'Neil, *Slow-Motion Miracle: One Boy's Journey Out of Autism's Grasp*, N.Y. Times, Dec. 29, 2004. That boy, named James, appeared to be a "bubbling two-year old who loved 'mashed totatoes' and sword-fighting." But that happy and engaged child was soon replaced by a "silent, unhappy child who repeated meaningless phrases, lay on the floor squinting or pulled cowboy boots on and off until his feet were raw." *Id.* After James was diagnosed, his parents put together a "bedside library" of books and other resources on autism, so that they could be useful participants in James' continuing development, education, and therapies. They learned that there *are* effective treatment options, but that those options are both cumbersome and expensive. The local school district willingly "prescribed" 10 hours per week of one-on-one therapy—but when James' parents noted that several of their sources had recommended intensive, 40-hours-per-week autism therapy, the school district flatly insisted that "quality, not quantity," was what mattered. *Id.*

In fact, autism research has recognized that, in the early years (ages 2-5), there exists a limited "window of opportunity" during which children with autism can effectively learn. *See* Gina Green, *Early Behavioral Intervention for Autism*, in *Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals* 39 (C. Maurice ed., 1996) ("The optimal age to begin intensive behavioral intervention is before the age of 5. So far, the best outcomes have been reported for children who started treatment at age 2 or 3."). Upon early diagnoses of the disorder, pediatricians commonly admonish parents to "immediately, immediately do something fast, now, right now" or risk "losing your child." *Jaynes v. Newport News School Bd.*, 2000 U.S. Dist. LEXIS 21684, at *1, *19 (E.D. Va. Sept. 7, 2000). Courts have begun to issue the same admonishments. *See J.H. v. Henrico County School Bd.*, 326 F.3d 560, 569 (4th Cir. 2004) (ordering a hearing officer to consider "window of opportunity" evidence when considering summer services for autistic child); *Lawyer v. Chesterfield County Sch. Bd.*, No. 3:92CV760, 1 Early Childhood L. Policy Rep. 297 (E.D. Va. May 24, 1993) (requiring school district to provide intensive and uninterrupted therapy during that "window of opportunity").

The most common treatment program during this "window," Applied Behavior Analysis (ABA), calls for highly structured, one-on-one interaction between a teacher and a child for 20 to 40 hours a week. *See generally* Lynn M. Hamilton, *Facing Autism* 81, 83, 90 (2000). Because of the explosion in diagnosed cases of autism, there is a great demand for these services during the "window"; for the privileged few, private schools have begun to emerge to provide the necessary services. But both demand and cost is enormously high for these few private-school slots: Even if a family makes it through the often-lengthy waiting list before the "window of opportunity" closes, the cost of these private schools can reach up to $70,000 per year. Sue Herera, *Demand Soars For Autism-Related Schools, Services*, CNBC, Feb. 25, 2005 (available at http://www.msnbc.msn.com/id/7013436/). (By comparison, the median income for American households is just over $43,000 per year. Press Release, *Income Stable, Poverty Up, Numbers of Americans With and Without Health Insurance Rise, Census Bureau Reports*, U.S. Census Bureau CB04-144 (Aug. 26, 2004).) Parents unable to pay this hefty price may opt to employ an individual therapist for 25 hours per week at a price of roughly $5,000 per month ($60,000 per year) for their services. Sue Herera, *Parents of Autistic Kids Battle For Medical Coverage*, CNBC, Feb. 23, 2005 (available at http://www.msnbc.msn.com/id/7012824/). A bare-bones in-home program—one that is run by the parents with some minimal help from a consultant, and staffed by uncertified "therapists" (usually college students)—costs $20,000 to $25,000 per year, according to a nine-year-old resource. Stephen C. Luce & Kathleen Dyer, *Parents' Questions, Parents' Voices*, in *Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals* 352 (C. Maurice ed., 1996). Most often, health insurers deny coverage for this therapy on the ground that it is "medically unnecessary"; that leaves the parents with the options provided by public schools, or in court to sue their insurance company for coverage. *See The Autism Epidemic—Is the NIH and CDC Response Adequate: Hearing Before the House Comm. on Government Reform*, 107th Cong. (Apr. 18, 2002) (testimony of Lee Grossman, President, The Autism Society of America) (noting the lack of insurance coverage for autism therapy, and that "[t]he only avenue ... available to [parents] is services provided ... by the educational system"); *cf. Auton v. Attorney General of British Columbia*, [2002] B.C.J. No. 2258, 2002 BC. C. LEXIS 4799 (B.C. Ct. App. Oct. 9, 2002) (holding that ABA therapy is a "medically necessary" service that must be funded by that government's health-care system).

Here in the United States, wide social gaps exist in taking advantage of the limited "window of opportunity." Studies show that while signs of autism are visible before a child turns two, white children enrolled in the government health insurance program Medicaid are generally diagnosed at an average age of 6.3 years. David S. Mandell, Sc.D. *et al.*, *Race Differences in the Age at Diagnosis Among Medicaid-Eligible Children With Autism*, 41 J. Am. Acad. Child and Adolescent Psychiatry 1447 (Dec. 2002). Hispanic children are diagnosed at an average age of 7.4 years, and African-American children are diagnosed even later, at 7.9 years. *Id. See generally* Alison McCook, *Autism Diagnosis Comes Later For Blacks Than Whites*, Reuters, Nov. 13, 2002. And early diagnosis is only half the battle; only the strongest and most well-off of families can afford, financially as well as emotionally, to "fight the system" on all the necessary fronts, as well as put in place stopgap measures pending the resolution of the legal and educational fights. When school districts refuse to provide the necessary intensive therapy during this important period, precious few parents have the resources to pay for private instruction or to battle an insurance company.

Thus, for most families, the IDEA-guaranteed "free appropriate public education" is the only option. Unfortunately, so many of these parents still find themselves "hir[ing] a lawyer before they meet the preschool teacher." Jane Weaver, *Inside the Treatment Maze—No Single Approach is Best for Every Child*, MSNBC, Feb. 23, 2005 (available at http://www.msnbc.msn.com/id/6948119/). It goes without saying that this only diverts the parents' finite time, energy, and finances from educating and rehabilitating the child during the formative and fleeting "window of opportunity." *See President's Commission*, at 40; *see also School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1985) (noting that parents without "adequate means" are left to engage the "ponderous" review process of IDEA and, in the meantime, "go along with the IEP to the detriment of their child").

James, the boy described in John O'Neil's *New York Times* article, was fortunate enough to have parents who could provide both a temporary private education and a long-term legal strategy: They were strong-willed and otherwise sufficiently equipped to recognize that "if [they] let the district pound on [their] child without hitting back, the pounding would never stop." *See* O'Neil, *supra*. So they hit back: The parents first sued the school district for not providing James an appropriate education. His mother then gave up her full-time job; his parents remodeled their basement; and they employed an autism expert to establish a specialized "school for one." But their investment paid dividends: The tedious, intensive therapy eventually "jump-started some slumbering connection in [James'] brain."

Seemingly tiny steps such as touching his nose on command, asking for "cheese crackers," and rolling toy cars down steps were giant leaps for young James. After a year of therapy, James began "waking up," but the drain of "time, emotion and money" was exhausting on James' family. *See* O'Neil, *supra.*

In fact, the personal costs of dealing with raising a child with autism may be even more dear than the out-of-pocket costs. A British study found that parents there caring for a disabled child often reported severe depression leading to, in some cases, nervous breakdowns. M. Dowling & L. Dolan, *Families with Children with Disabilities—Inequalities and the Social Model*, 16(1) Disability & Society 21, 30 (2001). Children with autism present particular challenges with respect to parental depression, because such children are often incapable of showing and reciprocating love in the typical and expected ways. *See* Stanley I. Greenspan, M.D., *The Affect Diathesis Hypothesis: The Role of Emotions in the Core Deficit in Autism and in the Development of Intelligence and Social Skills*, 5(1) J. of Developmental and Learning Disorders 1, 5 (2001). The behaviors characteristic of children with autism can lead to the entire family's "exclusion from mainstream and integrated school and community environments." D. Moes, *supra*, at 84 (citing research studies). With vast financial resources and parents' finite time being devoted to the upbringing and education of the child with autism, "the whole family unit" can and often does become strained. Dowling & Dolan, *supra*, at 24. Other children in the family without autism may begin to resent the disproportionate attention being paid to their sibling with autism, *see* Jane Gross, *For Siblings of the Autistic, A Burdened Youth*, N.Y. Times, Dec. 10, 2004, and the inevitable re-centering of the parents' attention on the child with autism can cause the marriage itself to wither and die from neglect. *See generally* Towbin, *Autism Spectrum Disorders*, at 352. Recent Congressional remarks note the extraordinarily high divorce rate of affected families, *see* 150 Cong. Rec. H2596 (daily ed. May 5, 2004) (statement of Rep. Murphy), and therapists are now beginning to see a spate of cases where parents commit suicide because they are unable to deal with the toll of the disorder. *See* Victoria Clayton, *Coping with Autism; Families Connect and Deal with the Diagnosis*, MSNBC, Feb. 24, 2005 (available at http://www.msnbc.msn.com/id/698852/).

The system intended to defray these high costs is far from perfect: Parents are forced to fight for their disabled child's rights, often at the expense of the relationships that are intended to facilitate education and a functioning family unit. Engel, 1991 Duke L.J. at 194-205. And despite such committed advocacy, at present, "only a relative handful of children with autism are thought to receive even the minimum standard of care, a pattern reflected in an increase in requests for institutional placements as the leading edge of [the] last decade's [children with autism has begun to] reach[] adolescence." *See* O'Neil, *supra.*

A recent study in the United Kingdom confirmed that adults with autism, even "high-functioning" individuals, have tremendous difficulty in living independent lives, and that parents of such individuals shoulder the burden of caring for them well beyond their school years. *See* The National Autistic Society, *Ignored or Ineligible? The Reality for Adults with Autistic Spectrum Disorders* 6-7 (2001) (reporting that "70% of parents felt that their son or daughter would be unable to live independently without support[,] [l]ess than 10% of adults can manage the most basic household tasks such as shopping, preparing meals, laundry, paying bills, managing money, without help," and "only 3% of adults at the higher end of the autism spectrum are living fully independently, and a further 8% are living independently with some regular professional or family support"). For the parents of a newly diagnosed three-year-old with autism, the real issue becomes whether that child's college fund will instead be available as a "group home fund."

The societal costs of institutionalizing young adults far exceed any costs that might be incurred at the elementary and pre-elementary levels. *See* J.W. Jacobson *et al.*, "*Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children with Autism*," 13 Behavioral Interventions 201 (1998) (estimating societal savings over the life of a person with autism of between $1.6 and $2.8 million per person with autism if intervention is widespread, early and effective). If one of the goals of education is to prepare as many children as possible to become society's productive and integrated adults, it cannot possibly be considered a success if the "free appropriate public education" guaranteed by IDEA ends up with more young adults in public institutions for the rest of their lives.

* * * *

This Court cannot make autism go away. It cannot give parents the seemingly infinite inner strength and financial resources needed to raise a child with autism. Nor can it guarantee that families and marriages will not be crushed by the weight of the burden of raising a child with this condition. But what it can do in this case is to recognize the policies of the IDEA, and the realities of raising a child with special needs (of which autism is only one recurrent kind), by placing the burden of proof in IDEA cases on the school district, where it appropriately lies. The end result will be that educators will have the burden in matters of education, and parents will have the burden in matters of parenting. That is completely consistent with the goal of the IDEA to provide a free appropriate public education; it is completely consistent with the respective responsibilities of the IEP "teammates"; and it is a completely sensible, and eminently workable, result.

CONCLUSION

For these reasons, *amici* urge the Court to reverse the judgment of the Fourth Circuit.

Respectfully submitted,

BETH T. SIGALL
THE LAW OFFICE OF BETH T. SIGALL, PLLC
969 North Potomac Street
Arlington, VA 22205-1649
(571) 215-3435

GREGORY A. CASTANIAS
(*Counsel of Record*)
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Amici Curiae

THOMAS F. URBAN II
LAW FIRM OF THOMAS F. URBAN II, PLLC
2867 S. Abingdon Street
Arlington, VA 22206
(703) 861-5235

Counsel for Amicus Curiae Parents for Autistic Children's Education (PACE™)

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Supreme Court of the United States

◆

BRIAN SCHAFFER, a minor by his parents and next friends, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, *et al.*,

Respondents.

◆

On Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

◆

JOINT APPENDIX

◆

WILLIAM H. HURD*
SIRAN S. FAULDERS
PAIGE S. FITZGERALD
TROUTMAN SANDERS, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)
**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG & ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

Counsel for Petitioners

MAREE F. SNEED*
JONATHAN S. FRANKLIN
GREGORY G. GARRE
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416 (phone)
(202) 637-5910 (fax)
**Counsel of Record*

ZVI GREISMANN
MONTGOMERY COUNTY PUBLIC SCHOOLS
Room 174
850 Hungerford Drive
Rockville, Maryland 20850
(301) 279-3549 (phone)
(301) 279-3819 (fax)

Counsel for Respondents

Petition For Certiorari Was Filed On November 19, 2004
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U.S. District Court
District of Maryland (Greenbelt)
CIVIL DOCKET FOR CASE #: 8:99-cv-00015-PJM
Date Filed: 01/05/1999

Date Filed	#	Docket Text
01/05/1999	1	COMPLAINT filed; FILING FEE $150 RECEIPT # 129324 (ajh, Deputy Clerk) (Entered: 01/06/1999)

* * *

Date Filed	#	Docket Text
02/10/1999	3	ANSWER to Complaint by Paul Vance, Board of Education (Attorney Zvi Greismann, Edmund W. Law), with Acknowlegment [sic] of Summons and complaint(c/s) (rank, Deputy Clerk) (Entered: 02/16/1999)

* * *

Date Filed	#	Docket Text
08/06/1999	8	MOTION with memorandum in support by Paul Vance, Board of Education for Summary Judgment (c/s) (td, Deputy Clerk) (Entered: 08/06/1999)
08/06/1999	9	MOTION with memorandum in support by Plaintiffs for Summary Judgment (c/s) (rank, Deputy Clerk) (Entered: 08/09/1999)

* * *

Date Filed	#	Docket Text
10/27/1999	18	Transcript of proceedings held before the Office of Administrative Hearings and final decision of 7/9/98 (FILED SEPARATELY) (ajh, Deputy Clerk) (Entered: 11/01/1999)

* * *

12/07/1999		Motion hearing held before Messitte, J. re: [8-1] motion for Summary Judgment – Argued – taken under advisement (ER: Peterson) (ajh, Deputy Clerk) (Entered: 12/08/1999)

* * *

03/16/2000	23	MEMORANDUM OPINION (signed by Judge Peter J. Messitte) (c/i 3/20/00 (lad, Deputy Clerk) (Entered: 03/20/2000)
03/16/2000	24	ORDER rendering moot [8-1] motion of defendant for Summary Judgment; granting [9-1] motion of plaintiff for Summary Judgment; "REMANDING" this case to the Administrative Law Judge; and "DIRECTING" the Clerk to Close this Case (signed by Judge Peter J. Messitte) (c/i 3/20/00) (microfilmed 3/20/00) (lad, Deputy Clerk) (Entered: 03/20/2000)

* * *

04/13/2000	25	NOTICE OF APPEAL by Board of Education, Paul Vance. Fee Status: $105.00 Filing Fee Paid Appeal record due on 5/13/00 (c/s) (mlb, Deputy Clerk) (Entered: 04/14/2000)

* * *

02/05/2001	35	JUDGMENT OF USCA (certified copy) "VACATING" the judgment of the USDC and "REMANDING" to the USDC for further proceedings Re: [25-1] appeal by Paul Vance, Board of Education (mlb, Deputy Clerk) (Entered: 02/05/2001)

02/05/2001		Case reopened (rank, Deputy Clerk) (Entered: 02/08/2001)

* * *

03/09/2001	36	COMPLAINT filed and Exhibits 1-3 (c/s) (ajh, Deputy Clerk) (Entered: 03/13/2001)
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* * *

04/09/2001	40	ANSWER by plaintiffs/counter-defendants to counterclaim (c/s) (ajh, Deputy Clerk) (Entered: 04/09/2001)
04/20/2001	41	MOTION with memorandum in support by defendants Brian Schaffer, Martin Schaffer, Jocelyn Schaffer for Preliminary Injunction, Declaration and Exhibits 1-3 (c/s) (ajh, Deputy Clerk) (Entered: 04/23/2001)
05/04/2001	42	RESPONSE by plaintiffs in opposition to [41-1] motion for Preliminary Injunction by Jocelyn Schaffer, Martin Schaffer, Brian Schaffer and attachment (c/s) (ajh, Deputy Clerk) (Entered: 05/07/2001)
05/04/2001	43	Transcript of hearing held before the Maryland State Department of Education and Exhibits (FILED SEPARATELY) (ajh, Deputy Clerk) (Entered: 05/08/2001)

* * *

05/14/2001	45	MOTION with memorandum in support by Brian Schaffer, Jocelyn S.

		Schaffer, Martin P. Schaffer for Summary Judgment (c/s) (lad, Deputy Clerk) (Entered: 05/15/2001)
05/14/2001	46	Transcript of Pre Hearing Telephonic conference (4) held before the Administrate Law Judge on June 1, 2000; Aug. 3, 2000; Aug. 28, 2000; and Aug. 31, 2000 (FILED SEPARATELY) (rank, Deputy Clerk) (Entered: 05/16/2001)

* * *

05/18/2001	49	REPLY by Brian Schaffer, Jocelyn S. Schaffer, Martin P. Schaffer to response in opposition by plaintiffs to their [41-1] motion for Preliminary Injunction by Jocelyn Schaffer, Martin Schaffer, Brian Schaffer and Exhibit 1 (c/s) (rank, Deputy Clerk) (Entered: 05/21/2001)
06/13/2001	50	RESPONSE by Jerry Weast, Board of Education in opposition to [45-1] motion for Summary Judgment by Martin P. Schaffer, Jocelyn S. Schaffer, Brian Schaffer (rank, Deputy Clerk) (Entered: 06/14/2001)
06/13/2001	50	CROSS-MOTION by Jerry Weast, Board of Education for Summary Judgment (c/s) (rank, Deputy Clerk) (Entered: 06/14/2001)
06/13/2001	51	MEMORANDUM by Jerry Weast, Board of Education in support of [50-1] opposition response by Board of Education, Jerry Weast [50-1] motion for Summary Judgment by Board of Education, Jerry Weast and Exhibits 1 thru 3 (c/s) (FILED SEPARATELY) (rank, Deputy Clerk) (Entered: 06/14/2001)

* * *

07/06/2001	55	REPLY by Brian Schaffer, Jocelyn S. Schaffer, Martin P. Schaffer to response in opposition to their [45-1] motion for Summary Judgment (rank, Deputy Clerk) (Entered: 07/09/2001)
07/06/2001	55	RESPONSE by Brian Schaffer, Jocelyn S. Schaffer, Martin P. Schaffer in opposition to [50-1] motion for Summary Judgment by Board of Education, Jerry Weast (c/s) (rank, Deputy Clerk) (Entered: 07/09/2001)

* * *

08/06/2001	57	REPLY by Jerry Weast, Board of Education to response by defendants in opposition to their [50-1] motion for Summary Judgment by Board of Education, Jerry Weast (c/s) (rank, Deputy Clerk) (Entered: 08/07/2001)

* * *

08/27/2001		Motion hearing held before Messitte, J. re: [41-1] motion for Preliminary Injunction, [45-1] motion for Summary Judgment, [50-1] motion for Summary Judgment – "ARGUED" – Taken under Advisement (Court Reporter: Williams) (lad, Deputy Clerk) (Entered: 08/28/2001)

* * *

11/25/2002	61	OPINION (signed by Judge Peter J. Messitte 11/21/02) (c/i 11/25/02) (mib, Deputy Clerk) (Entered: 11/25/2002)
11/25/2002	62	ORDER "GRANTING" [45-1] motion for Summary Judgment, "AFFIRMING" decision of Administrative Law

		Judge insofar as he found MCPS did not provide Brian Schaffer with a FAPE for the school year 1998-99; "REVERSING" decision insofar as awarding Brian's parents reimbursement for only one-half of the tuition costs for that year; "DIRECTING" MCPS to Reimburse the Schaffers for Brian's full tuition for said school year; "DENYING" [50-1] motion for Summary Judgment, "DENYING" [41-1] motion for Preliminary Injunction, and stating all other pending motions are "MOOT"; "ENTERING" Final Judgment in favor of Defendants and Counsel for the parents may submit appropriate Petition for Fees (signed by Judge Peter J. Messitte 11/21/02) (c/i & microfilmed 11/25/02) (mib, Deputy Clerk) (Entered: 11/25/2002)

* * *

12/18/2002	63	NOTICE OF APPEAL by Jerry Weast, Board of Education. Fee Status: $105.00 filing fee paid Appeal record due on 1/17/03 (mlb, Deputy Clerk) (Entered: 12/30/2002)

* * *

08/02/2004	66	JUDGMENT of USCA (certified copy) "REVERSING" the judgment of the USDC and "REMANDING" case to the USDC for further proceedings consistent with the Court's opinion; as to [63] Notice of Appeal filed by Board of Education of Montgomery County, Jerry Weast (mlb, Deputy Clerk) (Entered: 08/02/2004)

08/10/2004	67	ORDER REOPENING CASE. Signed by Judge Peter J. Messitte on 08/09/2004. (c/m 8/10/04) (elt, Deputy Clerk) (Entered: 08/10/2004)
09/03/2004		MANDATE of USCA (certified copy) Opinion and Certified Copy of Judgment, re [63] Notice of Appeal – Final Judgment (krc, Deputy Clerk) (Entered: 09/08/2004)

* * *

10/29/2004	70	ORDER "STAY" action pending Supreme Court's action on Plaintiffs' Petition for Certiorari re 69 Status Report filed by Martin P. Schaffer, Brian Schaffer, Jocelyn Schaffer, Martin Schaffer, Jocelyn S. Schaffer, and directing Clerk to ADMINISTRATIVELY CLOSE this case. Signed by Judge Peter J. Messitte on 10/29/2004. (c/m 11/1/04) (elt, Deputy Clerk) (Entered: 11/01/2004)

General Docket
US Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 03-1030 Filed: 1/7/03
Nsuit: 3440 Civil Rights: Other
Schaffer, et al v. Weast, et al
Appeal from: District of Maryland at Greenbelt

1/7/03	Civil case docketed. [ldj]
	* * *
4/16/03	Brief and joint appendix filed by Appellant Board of Education, Appellant Jerry Weast.
	* * *
4/30/03	Amicus curiae brief filed by Amicus Supporting Appellant Natl School Boards, Amicus Supporting Appellant MD Assn of Boards, Amicus Supporting Appellant NC School Boards, Amicus Supporting Appellant SC School Bd Assoc, Amicus Supporting Appellant VA School Bds Assn
	* * *
5/1/03	ORDER FILED [3780546] granting motion to file addendum to brief
5/19/03	Brief filed by Appellee Martin Schaffer, Appellee Jocelyn Schaffer, Appellee Brian Schaffer.
	* * *
6/4/03	Reply brief filed by Appellant Board of Education, Appellant Jerry Weast.
	* * *
1/23/04	Oral argument heard. panel: Honorable J. H. Wilkinson, Honorable J. M. Luttig, Honorable M. B. Michael, Courtroom Deputy: JLC, Jr.
7/29/04	Published authored opinion filed. Copies to all parties.
7/29/04	Judgment order filed. Decision: reversed and remanded. Dissenting opinion filed. EOD Date: 7/29/04.
	* * *
8/12/04	Petition filed by Appellee Martin Schaffer, Appellee Jocelyn Schaffer, Appellee Brian Schaffer for rehearing.
	* * *
8/24/04	COURT ORDER filed [4039182] denying motion for rehearing [4033469-1] EOD Date: 8/24/04, denying motion for rehearing en banc
	* * *
9/1/04	Mandate issued.
2/28/05	Supreme Court order received granting petition certiorari
	* * *

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS, JOCELYN AND MARTIN SCHAFFER, AND AS HIS NEXT FRIEND

VS.

MONTGOMERY COUNTY PUBLIC SCHOOLS

* BEFORE STEPHEN J. NICHOLS ADMINISTRATIVE LAW JUDGE OF THE MARYLAND OFFICE OF ADMINISTRATIVE HEARINGS #98-MSDE-MONT-OT-016662

* *

REQUEST FOR MEDIATION/DUE PROCESS HEARING

I request

☐ Mediation Only
☒ Hearing Only
☐ Both

STUDENT FOR WHOM MEDIATION/DUE PROCESS HEARING IS REQUESTED:

Name: BRIAN SCHAFFER

Birthdate: 5-13-84

Address: 11840 Beekman Place
Potomac, MD 20854

County of Residence (or Baltimore City) Montgomery County

School of Attendance: Herbert Hoover Middle School

PERSON REQUESTING MEDIATION/DUE PROCESS HEARING:

Name: Mr. and Mrs. Brian Schaffer

Address: (see above)

Phone: **(W)** Contact attorney **(H)** **(FAX)**

Relationship to Student: ☒ **Parent** ☐ **Legal Guardian** ☐ **Public Agency** ☐ **Self** ☐ **Parent Surrogate**

If a local school board is the applicant, please designate a contact person and telephone number).

ATTORNEY/REPRESENTATIVE (if applicable):

Name: Holly L. Parker, Esq.

Address: 1776 Massachusetts Ave. Suite 300
Washington, DC 20036

Phone: (202) 667-7373 **(FAX)** (202) 667-9146

1. **Please indicate three (3) dates when you and your representative (if you have one) are available within the next twenty (20) days for mediation (if requested) and three (3) dates within the next thirty (30) days when you and your representative and witnesses are available for the hearing (if requested).**

	Mediation		**Hearing**
a.		**a.**	June 16, 1998
b.		**b.**	
c.		**c.**	

2. **Special Accommodation Requests for the Mediation/Due Process Hearing (please be specific):**

☐ **Interpreter**

  ☐ **Foreign Language** ____________
  ☐ **Sign Language** ____________
  ☐ **Other** ____________

☐ **Special Communication** ____________

☐ **Special Accommodations for Disability** ______

☐ **Other** ____________

*** * * IMPORTANT INFORMATION * * ***

In accordance with the Individuals with Disabilities Education Act (IDEA), please provide a description of the problem and issues to be reviewed at the hearing, including relevant facts, and a proposed solution to the problem.

ISSUES:

Brian Schaffer

Brian is a student in Montgomery County, Maryland. At issue is whether the placement recommended by MCPS for the 1998-1999 school year at Hoover Middle School is appropriate, and if not, whether the placement at the McLean School is appropriate. Parents have duly notified MCPS of their intention to enroll Brian at the McLean School and have informed them of their disagreement with the proposed program. The placement at Hoover is too large, not structured enough, has insufficient services and does not include required related services. Additionally, we are in disagreement with the Intensity of service proposed and do not believe it complies with COMAR requirements. The IEP is also at issue as we do not believe MCPS has identified Brian's complete disability and have not signed the IEP. This statement is intended to comply with any federal or state regulations, and is not intended as a exhaustive list of issues in this case. If further clarification is necessary we would be agreeable to participating in a telehearing with the assigned ALJ.

/s/ Holly L. Parker/ELD. 5-26-98
Signature of Applicant **Date**

MAIL OR DELIVER APPLICATION TO:
(Public Agency Complete with Name and Address)

Mrs. Elinor Rouff
Division of Equity Assurance and Compliance
Montgomery County Public Schools
850 Hungerford Drive, Room 225
Rockville, Maryland 20850

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JERRY D. WEAST, *et al.*, Plaintiffs, v. BRIAN SCHAFFER, *et al.*, Defendants.	Civil Action No. PJM-99-15

DECLARATION OF JOCELYN SCHAFFER

Jocelyn Schaffer declares and says as follows:

1. I am the mother of Brian Schaffer. I make this declaration at the request of and for use by the attorneys representing my family in special education matters for Brian. The matters discussed herein are from my personal knowledge.

2. Brian has learning disabilities and attentional issues which require that he receive specialized, structured, individualized, and flexible support in order for him to receive benefit from his educational program.

3. During the fall semester of the 1997-98 school year, my husband and I requested that MCPS initiate the process of determining Brian's eligibility for special education and proposing a program for him. At that time, we began to explore alternative placements for him, both public and private.

4. For the 1998-99 school year, MCPS proposed to place Brian in a program at Hoover Middle School, his home school, where the class sizes were much larger, and the special education services significantly less intensive, than we felt would be appropriate for him. Educators at Green Acres School, where Brian attended from Pre-Kindergarten through 7th grade, and the educational psychologist and speech pathologist/audiologist who performed thorough evaluations of Brian's needs, agreed with our assessment that the MCPS proposal was not appropriate for Brian.

5. Based on the recommendations of Brian's private evaluators, and my visits to various schools, my husband and I believed that McLean School would be a proper placement for him.

6. The McLean School is a nonpublic school that offers both regular education and an intensive special program for students with disabilities, as well as a combination of these programs according to the needs of individual students.

7. Since MCPS had not offered Brian an appropriate placement by the summer preceding the 1998-99 school year, my husband and I enrolled him at McLean School and have since been funding him in that placement.

8. Brian has been and continues to be successful in, and benefits from, his educational placement at McLean.

9. On August 15, 2000, MCPS convened an IEP team to discuss Brian's educational needs and to propose a program and placement for the 2000-01 school year.

10. Following the August 15, 2000, IEP meeting, MCPS offered Brian a placement in the Learning Center at Walter Johnson High School. Exhibit 1.

11. The Learning Center at Walter Johnson High School is a program within a general education high school in which students with learning disabilities can receive specialized instruction. The program has small classes taught by special educators. This program is consistent with the type of program that we believe our son requires to be successful.

12. The school system did not propose the Learning Center for Brian until August 15, 2000 – or indeed, make *any* prior mention of that program as a possibility for him. This proposal did not come until after our contract with McLean School for the 2000-2001 school year had become binding, and we were contractually obligated to pay the annual tuition in full. Additionally, there was no way to realistically accept the proposal for a program we had never seen, and about which we had no information, nor time to prepare to transition Brian into a school considerably larger than those he had been attending for his entire school career. We therefore were unable to accept the proposed program at Walter Johnson for the 2000-01 school year, but agreed to explore it as a viable option for the following school year. Exhibit 2.

13. Throughout this school year, I have been in contact several times with Janan Slough, the Director of the Learning Center. Brian and I visited the program on February 16, 2001, and on June 15, 2001, I have an appointment to return to enroll Brian there. Exhibit 3. My husband and I do not now intend for Brian to return to McLean School for the 2001-02 school year.

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 4-16/01 /s/ Jocelyn Schaffer
Jocelyn Schaffer

PLAINTIFF'S EXHIBIT 1

[LOGO]
850 Hungerford Drive * Rockville Maryland * 20850-1747
Telephone (301) 279-3181

August 17, 2000

Mr. and Mrs. Martin Schaffer
11840 Beckman Place
Potomac, Maryland 20854

RE: Brian Schaffer (5/13/84)

Dear Mr. and Mrs. Schaffer:

On August 15, 2000, the Individualized Education Program (IEP) team at the central level met to consider the IEP and placement for Brian for the 2000-2001 school year.

The team recommended a resource/classroom combination through the secondary learning center at Walter Johnson High School as the appropriate program in the least restrictive environment for Brian. This action was taken primarily for the following reasons:

> The documentation describes Brian as a 16-year-3 month-old student with a specific learning disability.

> Brian's assessed needs for special education require, as stated on the enclosed IEP, 18.75 hours per week of specialized instruction and .75 hours per week of counseling, which can be met through the implementation of an appropriate IEP in the recommended program.
>
> Another considered option was a general education classroom; however, Brian's special education and related service needs exceed the services available in a general education classroom.

Please be aware that all available records (including each procedure, test, record or report) were considered as a basis for the recommendations of the placement or action. However, among the most significant records were: Psychological Report (3/00); Educational Assessment (2/00); Speech/Language Report from Kamara Center (6/99); Ms. Brahm's review of the Kamara Speech/Language Report (5/00); Teacher Reports (3/00); and information presented at the meeting. A copy of the IEP is enclosed for your records.

Please contact Ms. Janan Slough, coordinator, by calling 301-571-6921, to make an appointment to participate in a meeting to discuss the implementation of Brian's IEP with school staff who may work with him. If this office can be of further assistance, please notify Ms. Lauree Hemke, placement specialist, at 301-279-3181.

If you feel that this recommendation is inappropriate, you may request either mediation or appeal this decision. You have received a copy of the *Procedural Safeguards Brochure,* which explains your rights and steps in this process. If you need assistance in interpreting this information, please contact Mrs. Hemke.

We wish Brian a successful school experience.

Sincerely,

/s/ George R. Moore
George R. Moore
Team Leader, Placement Unit

GRM:arb

Enclosures

Copy to:
Dr. Benz
Mr. Eig w/enclosure
Mr. Greismann w/enclosure
Mrs. Hemke
Mr. Leighty
Ms. Russell
Ms. Slough
Mr. Stetson

PLAINTIFF'S EXHIBIT 2

Jocelyn & Martin Schaffer
11840 Beckman Place
Potomac, MD 20854

August 29, 2000

Mr. George R. Moore
Team Leader, Placement Unit
Montgomery County Public Schools
850 Hungerford Drive
Rockville, MD 20850-1747

Dear Mr. Moore:

Thank you for your letter of August 17, formally notifying us of the ARD team's placement recommendation for our son, Brian. We appreciate your consideration of the many records and other information presented at the ARD meeting on August 15 and are happy that you agree that Brian needs small classes taught by special educators.

The conclusion that the ARD team reached at its last meeting is consistent with what we have sought for Brian since we began the coding process in 1997. It was clear to us, to Brian's teachers, to the educational psychologist who evaluated him, and to the speech pathologist/audiologist who evaluated him, that he needs small classes taught by special educators.

The first ARD team to propose a placement for Brian in 1998 recommended that he attend Hoover Middle School for 8th grade. We rejected that proposal because we and the experts who had thoroughly evaluated him were certain that he could not succeed in the large classes at that school. As the County recommended no appropriate placement, we enrolled him at the McLean School of Maryland where he has been in small classes taught by special educators for 8th and 9th grades. McLean also has provided a nurturing environment – important to a child like Brian who has fragile self esteem – and has provided him the opportunity to have remedial tutoring at school. In addition, Brian has had individual speech and language therapy on a weekly basis and he completed a round of Fast Forward training last summer.

From our first ARD meetings in 1998 when we specifically asked what programs would be available for high school, no one ever disclosed that the County has a program at Walter Johnson with small classes taught by special educators for bright, learning disabled students. At subsequent ARD meetings a representative from Winston Churchill High School attended, as you know, but there was no representative from any other County program. We had no knowledge of the program you now recommend at Walter Johnson until our most recent meeting on August 15.

As you suggested, I have spoken to Janan Slough, coordinator of the program at Walter Johnson. She suggests that we visit during the third week of school, when her students will have had two weeks to settle into the program. We are eager to visit the program and to have Brian visit so that we can make an informed judgment about its appropriateness for him. If we do feel that the program is academically appropriate for him and that he would be able to adjust psychologically to the social aspects of a large school (something he has never experienced), he will need some time and preparation to make that transition. Unfortunately, because the County did not suggest the placement until August 15 and we did not know of the program's existence before then, there was no opportunity for us to visit the program in time to have him begin in it for this school year. Furthermore, our first tuition payment for Brian's 10th grade year at McLean was due August 1. As you know, the ARD meeting held on August 15 was postponed twice because key members of the County's team were not present when the meetings were convened. By that time our contract with McLean for the 2000-2001 academic year had become binding and we now are responsible for the full year's tuition. Therefore, while we ultimately may agree that the recommended placement at Walter Johnson is appropriate for Brian, the County made the recommendation too late for us to be able to accept it for the school year that is about to begin.

As an independent school accredited by the Association of Independent Maryland Schools, McLean has never needed or sought accreditation by the County as a special education school. Although you acknowledge that Brian's classes at McLean are taught by special educators, you informed us that the County does not officially recognize McLean's program as a "special education" program. We chose McLean because we felt that it would meet Brian's needs. (Brian's classes there are very small and all of his academic subjects are taught by special educators.) We also felt that McLean met the requirement of "least restrictive environment" because the school has classes for students who are traditional learners in addition to those for students with special needs. *We had to find a placement for our son for 8th grade because the County did not recommend a placement that was appropriate. He soon will begin his third year there because the County provided no acceptable alternative.*

Now that the County agrees that Brian needs small classes taught by special educators, we hope that you can look beyond the certification labels that do not apply to independent schools, and will fund his attendance at McLean – a placement which has small classes taught by special educators, and which we chose because we were not aware that there might be an appropriate alternative in the County system. We ask for tuition, attorneys' fees, and related expenses for 8th, 9th and 10th grades because it appeared to us that this was the only appropriate placement within a reasonable distance of our home. Because McLean has the elements that the County now finds essential to Brian's education and because the County withheld information about a possibly appropriate program within its own school system until now, we believe that funding should be approved.

Sincerely yours,

/s/ Jocelyn S. Schafer Martin P. Schaffer
Jocelyn and Martin Schaffer

Copy to:
Dr. Benz
✓ Mr. Eig
Mr. Greisman
Mrs. Hemke
Mr. Leighty
Mr. Russell
Ms. Slough
Mr. Stetson

PLAINTIFF'S EXHIBIT 3

Jocelyn and Martin Schafer
11840 Beekman Pl.
Potomac, MD 20854-1991

March 31, 2001

Ms. Janan Slough, Director
Secondary Learning Center Program
Walter Johnson High School
6400 Rock Spring Drive
Bethesda, MD 20814-1991

Dear Ms. Slough,

Thank you for taking the time to meet with me and with my son, Brian, on February 16th. We appreciated the opportunity to speak with you and to visit classes, and are impressed with your program and the warm welcome we received.

As you know from our subsequent telephone conversations, we intend to enroll Brian in the Walter Johnson Learning Center program in accordance with the ARD team's decision of August 15, 2000, beginning in the coming school year, 2001-2002. I called the MCPS central offices as you suggested, and was told that the enrollment process requires a meeting with you. I look forward to meeting you again on June 15, as we agreed, to enroll Brian in Walter Johnson and to discuss his transition. I will bring a copy of his McLean transcript to that meeting. In the meantime, if there are any procedures with which I should comply, or other documentation that I should bring, to enroll him or to arrange his transportation to school, please feel free to call me at 301-251-0668 or 301-468-8115.

Again, thank you for your time. I look forward to working with you over the next two years.

Sincerely yours,

/s/ Jocelyn Schaffer
Jocelyn Schaffer

cc:
Mr. George Moore,
Special Needs Placement Office
MCPS Central Office

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JERRY D. WEAST, *et al.*, Plaintiffs, v. BRIAN SCHAFFER, *et al.*, Defendants.	Civil Action No. PJM-99-15

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * *

---

[7] In an IEP meeting held on August 15, 2000, MCPS offered Brian a placement for the 2001-02 school year at the Walter Johnson Learning Center, in precisely the type of program for which his parents have been advocating for years. Brian's parents have accepted this public school placement, and plan to enroll him on June 15, 2001. This action exemplifies not only the good faith with which the Schaffers have always dealt with MCPS, but also the school system's admission that Brian requires a more intensive program than MCPS previously proposed for him. MCPS thus is paradoxically arguing here that Brian does not need the type of program that it now recommends and that the parents have accepted.

(6)

Supreme Court, U.S.
FILED

APR 2 9 2005

OFFICE OF THE CLERK

No. 04-698

In The
Supreme Court of the United States

◆

BRIAN SCHAFFER, a minor,
by his parents and next friends,
JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of
Montgomery County Public Schools, *et al.*,

Respondents.

◆

**On Writ Of Certiorari To The
Fourth Circuit Court Of Appeals**

◆

BRIEF OF PETITIONERS

◆

WILLIAM H. HURD*
SIRAN S. FAULDERS
PAIGE S. FITZGERALD
TROUTMAN SANDERS, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)
**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

LIST OF PARTIES

The petitioners are Jocelyn Schaffer and Martin Schaffer, appearing in their own right and as parents and next friends of their son, Brian Schaffer.

The respondents are Jerry Weast, Superintendent of the Montgomery County Public Schools, and the Board of Education of Montgomery County, Maryland.

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BRIEF OF PETITIONERS

The petitioners – parents of a child with disabilities – respectfully petition the Court to reverse the judgment of the court of appeals and rule that, under the Individuals with Disabilities Education Act, the school district – rather than parents – must bear the burden of proof at an administrative hearing held to assess the appropriateness of an individualized education program.

OPINIONS BELOW

There are six opinions below, culminating in the court of appeals ruling that is the subject of the writ of certiorari. In chronological order, they are as follows:

- In 1998, the administrative law judge ("ALJ") imposed the burden of proof on the parents and ruled for the school district on the merits of the child's individualized education program ("IEP"). This unpublished decision is reprinted in the appendix to the petition for writ of certiorari at Pet. App. 120.

- In 2000, the district court reversed the ALJ on the burden of proof issue, placed the burden on the school district, and remanded the case for further proceedings. This decision is published as *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). It is reprinted at Pet. App. 54.

- In 2000, with the burden of proof placed on the school district, the ALJ ruled for the parents on the merits, holding that the IEP proposed by the school district was inappropriate and that the program favored by the parents was appropriate. This unpublished decision is reprinted at Pet. App. 70.

- In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court's 2000 decision and remanded the case for further proceedings, including an appeal from the ALJ's second decision on the merits. The opinion is found at *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (*per curiam*). It is reprinted at Pet. App. 50.

- In 2002, the district court again placed the burden of proof on the school district, and it affirmed the ALJ's 2000 ruling for the parents on the merits. This opinion is published as *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002). It is reprinted at Pet. App. 21.

- Finally, in 2004, a divided court of appeals reversed the district court on the burden of proof issue, imposed the burden on the parents and remanded the case. This decision – the subject of the writ – is published as *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004). It is reprinted at Pet. App. 1. The dissent of Judge Luttig is reprinted at Pet. App. 16.

An unpublished denial of rehearing *en banc* is reprinted at Pet. App. 164. An order of the district court – following remand – to stay proceedings there pending this Court's disposition of the case is reprinted at Pet. App. 163.

JURISDICTION

The panel decision of the court of appeals was entered on July 29, 2004. The decision of the court of appeals denying the petition for rehearing *en banc* was entered on August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. A writ of certiorari was issued on February 22, 2005.

STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Reprinted in the appendix to the petition is § 1400, which contains congressional findings as well as the purpose of the IDEA. Pet. App. 166. Also reprinted is § 1415, which contains procedural safeguards, including the § 1415(f) requirement for an "impartial due process hearing." Pet. App. 174.

After the petition was filed, Congress enacted a reauthorization of the IDEA. *See* Individuals With Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446. Modified slightly by this legislation, the amended versions of § 1400 and § 1415 are reproduced in the Addendum to this brief. In both its previous form and its amended version, the IDEA is silent on the burden of proof.

STATEMENT OF THE CASE

Brian Schaffer, the petitioners' child, was 14 years old when this case began. Pet. App. 75, 124. Now twenty, he eventually attended – and ultimately graduated from – the public schools of Montgomery County, Maryland. Yet, he entered the public schools only *after* the Montgomery County Public Schools ("MCPS") finally offered him a placement in a Learning Center designed to provide specialized instruction to students with learning disabilities. This placement was consistent with the accommodation sought by Brian's parents, experts and teachers from the beginning. If the school district had only offered such a program to Brian when his parents first sought a placement, this case would not be here. *See* Joint Appendix ("J. App.") 14-16, 25.

Given the initial failure of MCPS to provide Brian an appropriate education program, his public school attendance was delayed by several years. During those years, Brian's parents, Jocelyn and Martin Schaffer, were forced to pay for a private school placement where he could obtain the necessary accommodation that the school district refused him. *See* J. App. 14-15. But, in a larger sense, this case is not just about the travails of Brian and his parents. It is about the single mother struggling to get help for her Down's Syndrome son. It is about the couple from the inner city whose attempts to obtain services for their wheelchair-bound daughter have been repeatedly stymied. It is about the brilliant but autistic child whose future as a productive citizen depends on the therapy services that his school district has unilaterally decided to slash.

Indeed, this case is about the 6.7 million children who receive services under the IDEA. For many of these children, the ability to obtain meaningful access to the education that the law guarantees them depends on the resolution of this basic question: Under the IDEA, who has the burden of proof at an administrative hearing – the parents or the school district?

A History of Discrimination

In the early 1970's, discrimination against children with disabilities was rampant. Indeed, "a majority of handicapped children in the United States 'were either *totally excluded* from schools or [were] *sitting idly* in regular classrooms awaiting the time when they were old enough to "drop out."'" *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (emphasis added) (quoting H.R. Rep. No. 94-332, p. 2 (1975)). The children who suffered such treatment numbered in the millions. *Id.* at 189 (citing 89 Stat. 774, note following § 1401).[1]

Faced with such an intolerable situation, parents and civil rights groups began turning to the federal courts, where they sought relief on constitutional claims. Among these cases were two landmark decisions: *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Commonwealth,* 334

F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) ("*PARC*"). Ordering an end to discrimination and exclusion, each case crafted a remedy requiring local school authorities to provide educational services to children with disabilities, and each gave parents the right to a hearing governed by principles of due process. These two cases contributed most prominently to action by Congress in 1975, when it enacted the Education for All Handicapped Children Act. *See Rowley*, 458 U.S. at 180 n.2. As the predecessor to the IDEA,[2] this federal law contained a requirement for an "impartial due process hearing" – the same administrative hearing where the burden of proof is at issue here.

The IDEA

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A).[3] Those funds are then reallocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school district to abide by certain standards in developing individualized education programs ("IEPs") for children with disabilities.[4]

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[1] *See* Brief for the Arc of the United States, *et al.* at 18-20 (discussing history of discrimination against disabled children).

[2] Now known as the IDEA, the law has been known by other names since it was first adopted in 1975, including the Education for All Handicapped Children Act (EAHCA) and the Education of the Handicapped Act (EHA). For the sake of consistency, this brief generally refers to the federal law as "the IDEA," even when the statute or case used one of the law's former names. This approach mirrors the one followed implicitly by the decision below and followed by other circuits as well. *See, e.g., Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915 n.2 (6th Cir. 2000) (explicitly adopting this approach to statutory nomenclature).

[3] The 2004 amendment added the words "further education."

A large number – and broad range – of students with disabilities are served by the IDEA, including many whose disabilities are quite severe. According to the U.S. Department of Education, more than 6.7 million students – aged 3 through 21 – were served by the IDEA, during the 2003-04 school year. Their disabilities and the number in each category are as follows:

Disability[5]	**Number**
Specific Learning Disabilities	2,881,068
Speech or Language Impairments	1,460,583
Mental Retardation	605,026
Emotional Disturbance	490,292
Multiple Disabilities	141,102
Hearing Impairments	79,522
Orthopedic Impairments	77,274
Other Health Impairments	467,259
Visual Impairments	29,140
Autism	163,773
Deaf-Blindness	1,921
Traumatic Brain Injury	23,481
Developmental Delay	305,752
All Disabilities	6,726,193

See U.S. Department of Education, Office of Special Education Programs, Data Analysis System, *available at*

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[4] The IEP is a written document developed by an IEP team that includes, *inter alia*, the child's parents, his teacher and local school division representatives. 20 U.S.C. § 1414(d). The IEP contains a statement of how the child's disability affects the child's involvement and progress in the general curriculum, a description of specific educational services to be provided to the child, annual goals, and objective criteria for evaluating progress. *Id.*

[5] Definitions and examples of these disabilities are found at 34 C.F.R. § 300.7(c)(10). *See* Add. 39.

<www.ideadata.org/tables27th/ar_aa7.htm> and <www.ideadata.org/tables27th/ar_aa9.htm> (visited Apr. 16, 2005).

The IDEA precludes school officials from making unilateral decisions about a child's IEP. Instead, such decisions must be made by school officials and parents in collaboration. As the U.S. Department of Education has explained, "parents and school personnel" are "equal participants" and "equal partners" in making decisions about the content of a child's IEP. 34 C.F.R. Part 300, Appendix A, "Interpretation of IEP and Other Selected Requirements under Part B of the [IDEA]," Question 9 ("USDOE Question 9"). If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an "impartial due process hearing" – to bring the issue before a neutral hearing officer (or administrative law judge) for resolution.[6] As a practical matter, it is almost always the parents who initiate the hearing because the school district usually can have its way simply by withholding the services in dispute.

Finally, the law provides that any party aggrieved by the results of the administrative hearing may appeal to a state court of competent jurisdiction or to a federal district court.[7]

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[6] 34 C.F.R. § 300.507(a)(1); 20 U.S.C. § 1415(f)(1)(A) (2004 amendment).

[7] *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review. 34 C.F.R. § 361.57(g). However, Maryland has not implemented this option.

The Petitioners' Child

There is "no question" that Brian Schaffer has multiple disabilities. Pet. App. 56. He is "learning disabled, language-impaired and other health impaired." Pet. App. 24. From pre-kindergarten through the seventh grade, Brian attended an independent school, Green Acres School. The tuition was paid by his parents and is not the subject of this dispute. At Green Acres School, Brian had the benefit of small class size and significant accommodations, as well as extra services provided by his parents. Despite these services, he did poorly. Pet. App. 24. In the fall of 1997, when Brian was in the seventh grade, Green Acres School concluded that he should attend a school that could more adequately accommodate his disabilities. Pet. App. 77. Brian's parents then turned to MCPS and began to seek an appropriate placement for the following school year. Pet. App. 24.

The school district agreed that, under the IDEA, it was obligated to provide Brian with special education and related services. Even so, MCPS rejected the conclusions of the outside experts who had evaluated Brian. It also rejected the recommendations of the Green Acres teachers who had worked with him. Instead, the school district accepted the rosier views of its own employees. Thus, there was disagreement about the nature of Brian's disabilities and, as a result, there also was disagreement about the services he required.

According to outside experts, Brian suffered from a "unique central auditory processing deficit." Pet. App. 108. As one such expert explained:

> [Brian's] auditory processing of words was so impaired . . . that his ability to execute any auditory tasks should be considered possibly compromised by this one feature.
>
> * * *
>
> [Brian's] serious needs in reading, writing, spelling and probably math indicate that he should be placed in a self-contained, full-day special education program.

Pet. App. 78, 126 (decision of hearing officer) (quoting report of Carol A. Kamara, Ph.D., CCC-SLP/A, an independent speech language pathologist/audiologist). In short, Brian needed "small, self-contained special education classes" that would "minimize the distractions interfering with his ability to learn." Pet. App. at 25.[8] This finding was consistent with the placement at the Learning Center that the school district belatedly offered Brian several years later. *See infra* at 13.

By contrast, the MCPS employees did not believe that Brian had a central auditory processing problem.[9] In their view, he only had a "mild speech-language disability" and, thus, did not need the more intensive accommodations recommended by the outside experts. Pet. App. 26. As a result, the IEP proposed by the school district called for Brian to be taught most of his academic subjects in a large classroom with 24-28 other students. For some subjects, the school district simply planned to place Brian in a regular classroom. Pet. App. 90. For other subjects, his classroom would use an "inclusion model" with two teachers, one of whom would work with five to six special education students in the midst of the other students and larger setting. Pet. App. 87. The larger class size and "inclusion model" formed the centerpiece of the IEP offered by the school district. *See* Pet. App. 87-91.

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[8] A discussion of the outside experts by the ALJ appears at Pet. App. 78-80, 91, 103-09.

[9] A discussion of the school district's experts by the ALJ appears at Pet. App. 83-84, 103-09.

In light of Brian's severe learning deficits and the advice of those experts most familiar with him, his parents advised MCPS that its proposed IEP was "insufficient to meet his identified needs." Rejecting the proposed IEP in May of 1998, Brian's parents requested an administrative due process hearing. Pet. App. 25. Anticipating a protracted dispute, they also enrolled Brian for the 1998-99 school year at the McLean School, where they had previously reserved a space. McLean is a private school in Montgomery County that accommodates learning and language-disabled students in small classes. Pet. App. 25.

Because MCPS did not offer Brian an appropriate education in the public schools, his parents sought reimbursement for the tuition and expenses they paid to the McLean School.[10] Pet. App. 22. *See School Comm. of Burlington v. Dep't of Educ.,* 471 U.S. 359, 369 (1985) (holding that IDEA authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."). Brian's parents also pursued their claim in order to obtain a favorable decision that would enable their child to receive an appropriate education from the school district in the coming years.

The ALJ's First Decision

The administrative hearing lasted three days. As directed by the ALJ, each side filed briefs on the burden of proof. Pet. App. 57. Each side argued that the burden should be borne by the other. Each side also presented expert testimony supporting its position on the merits. The outside experts, Brian's parents, and educators from Green Acres School explained that the school district's plan was deficient. The MCPS witnesses disagreed. After weighing the conflicting evidence, the ALJ concluded that it was evenly balanced and that the outcome of the case depended on which side had the burden of proof. Pet. App. 144.

The ALJ recognized that "[t]here is no clear authority" on who bears the burden of proof and that "[t]he case law provides support for assigning that burden to either party." Pet. App. 144. Confronted by the conflicting authorities, the ALJ elected the minority position, concluding that "the *Parents* bear the burden of persuasion." Pet. App. 146 (emphasis added). Thus, the petitioners were required to show that the IEP prepared by MCPS did not offer Brian an appropriate education. Having thus imposed the burden of proof on Brian's parents – and viewing the burden as "critical" to the outcome – the ALJ concluded that the parents had failed to meet their burden. Pet. App. 156. Thus, he ruled for the school district on the merits of the case, approving the school district's plan for Brian.

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[10] Although Brian graduated from high school in 2003, this case nonetheless presents a continuing controversy because petitioners seek reimbursement for the costs they incurred in providing their son the appropriate education services that the school district refused to provide. These costs total thousands of dollars for eighth grade alone. *See Zobrest v. Catalina Foothills Sch. District,* 509 U.S. 1, 4 n.3 (1993) (holding that claim for reimbursement preserves case as live controversy despite student's graduation).

The District Court – First Decision

Brian's parents appealed the ALJ's decision to the United States District Court for the District of Maryland.[11] There they prevailed. Reversing the ALJ on the burden of proof issue, the district court placed the burden on the school district and remanded the case back to the ALJ for further proceedings under the corrected standard. In so ruling, the district court relied heavily on an IDEA case decided by the New Jersey Supreme Court, *Lascari v. Board of Education,* 560 A.2d 1180, 1188 (N.J. 1989).[12]

Lascari is a seminal case explaining why the school district should *always* bear the burden of proof. Even so, on the facts before it, the district court found that it did not need to go so far as *Lascari*. Adhering to a middle course, the district court distinguished between two types of cases – those involving an *initial* IEP and those involving a proposed change to an *existing* IEP. With regard to an initial IEP, the district court ruled that *the school district* should have the burden of proof at the administrative hearing. However, "where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change." Pet. App. 55. This distinction was later obliterated by the sweeping language of the Fourth Circuit, which places the burden on the parents in *all* cases when they challenge a proposed IEP. *See infra* at 16-18.

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[11] *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of an ALJ], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). It is this statute that provided the basis of jurisdiction for the original action in district court.

[12] All but ignored by the two judges forming the Fourth Circuit majority, *Lascari* figures prominently in the split among lower courts. *See* Pet. at 25.

The School District's Change of Mind

The district court's decision placing the burden of proof on school authorities was rendered in March 2000. It was soon followed by the school district's belated disclosure to Brian's parents that it operated a Learning Center at one of its venues, Walter Johnson High School. The Learning Center is a program designed to educate students with learning disabilities by utilizing small classes taught by special educators. MCPS offered this program to Brian in August 2000, and it was enthusiastically embraced by his parents.[13] In short, when the school district was told by a federal court that it must bear the burden of proof, it finally offered Brian what it previously refused: an appropriate education. Meanwhile, the litigation over its earlier, inadequate IEP proposal continued.

The ALJ's Second Decision

When the remanded case came back to the ALJ, no new evidence was presented. Thus, the "weight of the evidence" again "rest[ed] in equipoise." Pet. App. 105, 109. With the burden now shifted to the school district, the ALJ ruled for the parents, concluding that the IEP failed to provide Brian with meaningful educational benefit. Pet. App. 110. As the ALJ explained, "[Brian's] learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the

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[13] This program was offered at an IEP meeting on August 15, 2000, a meeting that had been twice postponed because key representatives of the school district's team were not present when previous meetings were convened. Given the late date of the offer, the Schaffers' private school contract for the 2000-01 academic year had become binding, and they were responsible for the full year's tuition. Thus, Brian was enrolled in the Learning Center for the following academic year, 2001-02.

Child." Pet. App. 91.[14] Thus, the ALJ concluded that the IEP proposed by MCPS was "not appropriate" and "failed to afford [Brian] an opportunity for a FAPE . . . as required by IDEA." Pet. App. 115. At the same time, the ALJ ruled that Brian's private school placement "offers a setting and program appropriate to [Brian's] needs," Pet. App. 111, and he awarded Brian's parents *half* of the tuition they expended to obtain that placement for the 1998-99 school year. Pet. App. 115. Neither side found this decision satisfactory, and both appealed to the district court.[15] Meanwhile, other proceedings were underway in the court of appeals.

The Court of Appeals – First Decision

While the case was before the ALJ on remand, MCPS was simultaneously appealing the district court's 2000 decision to the Fourth Circuit. Although not critical to the outcome, this stage of the litigation is significant because of the involvement of the United States in support of the parents. The U. S. Department of Education, joined by the U. S. Department of Justice, Civil Rights Division, filed an *amicus* brief explaining why the burden should be placed on the school district.[16] To do otherwise, the United States said, would "unhinge [the] statutory framework" created by Congress. Brief for *Amicus Curiae* United States ("U.S. 2000 *Amicus* Brief") at 5, *Schaffer v. Vance*, 2 Fed. Appx.

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[14] The ALJ also determined that the "inclusion model" proposed by the school district actually would be counter-productive, and that the school district's proposal fell short in other ways. For example, "[t]he IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem." Pet. App. 91-92.

[15] As in the first appeal to the district court, the basis for jurisdiction was 20 U.S.C. § 1415(i)(2)(A). *See* n.11, *supra*.

[16] The United States has not participated in later stages of the case.

232 (4th Cir. 2001) (No. 00-1471), *available at* <www.usdoj.gov/crt/briefs/Schaffer.htm> (visited April 27, 2005). The government gave two overarching reasons for placing the burden of proof on the school district: (i) such an approach furthers the IDEA's goal of providing a free appropriate public education to children with disabilities, U.S. 2000 *Amicus* Brief at 6, and (ii) principles of fairness support allocating the burden to the party with greater access to necessary evidence. *Id.* at 13-14.

By the time the court of appeals heard oral argument, the ALJ had already ruled in favor of the parents. Thus, the court of appeals chose not to address the burden of proof until after the district court could hear an appeal from that second ALJ ruling. Instead, the court vacated the district court's decision and remanded the case "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits." Pet. App. 52.

The District Court – Second Decision

The case then came back before the district court, with the remand from the court of appeals linking up with cross-appeals from the ALJ's second decision. On cross-motions for summary judgment,[17] the district court again ruled that the school district had the burden of proof. Pet. App.

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[17] When an IDEA case is heard on appeal by a district court, the parties typically use cross-motions for summary judgment as the procedural mechanism to bring forward their competing claims for judgment based on the administrative record. This is so even when that record contains conflicting evidence. *See, e.g., Beth B. v. Van Clay,* 282 F.3d 493, 496 n.2 (7th Cir. 2002) ("Due to the unique procedural posture of these cases . . . summary judgment has been deemed appropriate even when facts are in dispute. . . ."); *L.B. v. Nebo Sch. Dist.,* 379 F.3d 966, 974 (10th Cir. 2004) (same); *Loren F. v. Atlanta Indep. Sch. Sys.,* 349 F.3d 1309, 1313 (11th Cir. 2003) (same). Use of this procedure is not an issue in this case.

32. Concluding that MCPS "did not provide Brian with FAPE for 1998-99," the court awarded the parents full reimbursement for the tuition they paid in the 1998-99 school year. Pet. App. 41, 47. The school district then appealed to the Fourth Circuit, challenging the allocation of the burden of proof.

The Court of Appeals – the Decision at Issue

On appeal, the Fourth Circuit noted that the circuits are deeply split on how to allocate the burden of proof in administrative hearings under the IDEA. According to the panel majority, "[t]hree circuits assign the burden to the parents, and four (perhaps five) assign it to the school system." Pet. App. 7. The court actually understated the split.[18] Siding with the minority view, the divided panel reversed the district court and held that "parents who challenge an IEP have the burden of proof in the administrative hearing." Pet. App. 16.

In reaching this result, the panel majority began by recognizing a general principle governing the allocation of burdens of proof. It said: "Although 'the natural *tendency* is to place the burden[] on the party desiring change' or seeking relief *other factors* such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." Pet. App. at 6 (emphasis added) (quoting J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Despite the precedents and "other factors" urged by Brian's parents, the majority "[saw] no reason to depart from the general rule that a party initiating a proceeding bears [the] burden [of proof]." Pet. App. 15.

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[18] Two other circuits not mentioned by the Fourth Circuit have in *dicta* placed the burden on the school district. Thus, after the decision below, the split is seven-to-four, with the majority placing the burden on the school district. *See infra* at 18.

Relying on this "default" principle, it ruled for MCPS and remanded the case back to the district court.

Judge Luttig dissented. Starting with the same general principle as the panel majority, he reached the diametrically opposite result. In his view, "[e]ach of these 'other factors' – policy, convenience and fairness – weigh against the assignment of the burden of proof to the parents. . . ." Pet. App. 17. Aligning himself with the majority of circuits, he concluded that "the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources." Pet. App. 16.

Following the panel decision, the court of appeals denied a petition for rehearing *en banc*. Pet. App. 164. Upon remand, the district court stayed further proceedings pending disposition of the case by this Court. Pet. App. 163.

In an epilogue to the decision below, the Fourth Circuit later ruled on the burden on proof in another IDEA case, *JH v. Henrico County School Board*, 395 F.3d 185 (4th Cir. 2005). While the case at bar involved an *initial* IEP, *JH* involved a school district's unilateral change to an *existing* IEP, where it dramatically cut – by 90 percent – the level of therapy provided to a child with autism.[19] Reversing the hearing officer, who had placed the burden on the school district, the Fourth Circuit said that, under its decision in *Weast*, the parents must bear the burden of proof even though the school district had unilaterally initiated a change to the IEP by cutting services. This is so, the Court simply said, because it is the parents who initiated the challenge. *Id.*, 395 F.3d at 195. The Fourth Circuit's decision in *JH* further illustrates the unfairness of the rule it has adopted.

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[19] At issue was the child's speech/language and occupational therapy, a form of services frequently necessary for children with autism. Instead of the previously-established two hours *per week* for each therapy, the school district was willing to provide "only two hours of speech/language therapy and two and a half hours of occupational therapy *for the entire summer.*" *JH*, Supplemental Joint Appendix at 87 (decision of hearing officer) (emphasis added).

The Split in the Circuits and the State Rules

This case presents a question of federal law for resolution by this Court. Even so, it may be helpful to note that *eleven* circuits have now addressed the same question – some by holdings, others by *dicta*. Four circuits – including the Fourth Circuit – have said that the burden of proof rests on the child's parents.[20] Seven circuits have said that the burden rests on the school district.[21] Additionally, in

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[20] In addition to the Fourth Circuit decision now at issue, circuit decisions that place the burden of proof on the parents are as follows: **Fifth Circuit:** *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986), and *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); **Sixth Circuit:** *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993); **Tenth Circuit:** *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990). *See* Pet. 17-21 (discussing circuit decisions placing burden on parents).

[21] The circuits that place the burden on the school district are as follows: **First Circuit:** *L.T. ex rel. N.B. v. Warwick School Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (*dictum*); **Second Circuit:** *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998); **Third Circuit:** *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3d Cir. 1993); **Seventh Circuit:** *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (*dictum*); **Eighth Circuit:** *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999); and *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); **Ninth Circuit:** *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); and **D.C. Circuit:** *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) (*but see* Pet. 25, explaining

(Continued on following page)

Lascari, supra, a decision distinguished by its depth of analysis, the New Jersey Supreme Court has placed the burden of proof on the school district.[22]

It may also be helpful to note that, in carrying out their programs under the IDEA, several States have adopted statutes or regulations that place the burden on the school district.[23] On the other hand, in the 30 years since the IDEA was adopted in 1975, the petitioners are aware of no State that has adopted a statute or regulation purporting to place the burden on the parents merely because they challenge the IEP proposed by the school district.

SUMMARY OF ARGUMENT

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

***Brown v. Board of Education*, 347 U.S. 483, 493 (1954)**

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the

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that the result in *McKenzie* may be better viewed as the result of regulation rather than a judicial allocation of the burden of proof). *See* Pet. 21-25 (discussing circuit decisions that place burdens on school districts).

[22] *See* Pet. 25-26 (discussing *Lascari*).

[23] *See, e.g.*, Alabama Administrative Code, Chapter 290-8-9-.08(8)(c)(6)(ii)(I) (placing burden of proof on school district at due process hearing); District of Columbia Mun. Regs. Title 5, § 3030.3 (same); Minnesota Rules 3525.3900(4)(f) (same); West Virginia Board of Education Regulations, Section 126-16-8.1.11c (same); Georgia Administrative Code, Rule 160-4-7-.18(1)(g)(8) (placing the burden on the school district except where parents propose a more restrictive environment.).

IDEA. It is, however, a right that is meaningful only if parents are able to hold local school districts accountable at the administrative hearings that are made available under that law.

The ability of parents to hold school districts accountable will be greatly affected by the answer this Court gives to the question presented by this petition. In an administrative hearing, which side has the burden of proof – the parents or the school district? It is a question that the IDEA does not address explicitly. Even so, the answer is inherent in the statute because (i) Congress clearly and unambiguously required that administrative hearings be governed by principles of "due process," 20 U.S.C. § 1415(f), and (ii) an analysis of due process principles dictates that the burden be placed on the school district.

When the three-prong due process inquiry recognized by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is applied to IDEA administrative hearings, three conclusions emerge: Under the first prong, the private interest at stake – the right to an appropriate education – is very important. Under the second prong, there is a high risk of erroneously damaging that interest if the burden is placed on the parents, and there is no risk of such injury if the burden is placed on the school district. Under the third prong, the government interests, on balance, weigh in favor of ensuring the child an appropriate education rather than shielding any marginal or short-term savings that may be associated with providing the services in dispute. All three of these conclusions point to the school district as the party that must bear the burden of proof.

Because the result reached by using due process analysis is grounded in the statute, the Court need go no further. Even so, the appropriateness of placing the burden on the school district is confirmed by the other rules used by courts to allocate the burden of proof, including "policy and fairness." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973). In an administrative hearing under the IDEA, both policy and fairness call for the burden to be placed on the school district.

The policies at work in the IDEA are very clear. Congress sought not only to end discrimination against children with disabilities, but to ensure every such child an appropriate education. It also sought to hold school districts accountable, by requiring a consensus between the school district and parents in the development of an IEP, and by providing for an "impartial due process hearing" in the event of an impasse. Congress' effort to implement these policy objectives are fortified by placing the burden on the school district; they become enfeebled by placing the burden on the parents.

Fairness also calls for placing the burden on the school district. Where the evidence at a due process hearing is evenly balanced, the ruling should be for the parents because of the sharply different consequences of an erroneous decision. The child will suffer far more harm if contested services are erroneously denied, than the local school district will suffer if those services are erroneously ordered. Additionally, this Court has recognized the appropriateness of placing the burden of proof on the party having special access to the information on which the factual issue depends. In IDEA cases, that party is the school district.

In placing the burden on the parents, the Fourth Circuit failed to articulate a persuasive reason for its decision. Contrary to its perception, the "playing field" is not level. It remains tilted against parents – especially lower income parents – in a number of significant ways, undermining their ability to participate in IDEA hearings on equal terms. Placing the burden upon them would further aggravate the situation. For all of these reasons, the Court should give its approval to the majority rule, place the burden on the school district, and reverse the court of appeals.

. ARGUMENT

"[A]ccountability is basic to the democratic system."
Senator Sam Ervin (1971)[24]

School districts are arms of government and, as such, they must be held accountable – just as all government must be held accountable. Indeed, the principle of accountability is a major component of the IDEA. Under this law, a school district is not just accountable to the public at large, it is accountable to specific individuals – the child and his parents. And, it is accountable not just through the political processes, but through administrative and legal processes designed to protect individual rights and ensure due process. Such rigorous accountability is part of Congress' response to the discrimination that children with disabilities once suffered in many school districts, and it is a principle that forms the essential background for the question presented by this case.

I. THE IDEA'S TEXT POINTS TO THE SCHOOL DISTRICT AS THE PARTY BEARING THE BURDEN OF PROOF.

Although the IDEA does not expressly allocate the burden of proof, a careful reading of its terms nevertheless compels the conclusion that, inherent in the statute, there is a requirement that the burden be placed on the school district. In establishing the IDEA, Congress did not merely require a "hearing," nor even an "impartial hearing." Instead, Congress required an "impartial *due process* hearing." 20 U.S.C. § 1415(f) (emphasis added). These words are not superfluous. *TRW Inc. v. Andrews*, 534 U.S.

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[24] *Secrecy in a Free Society*, 213 Nation 454, 456 (1971).

19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted).

Deliberately chosen by Congress, the term "due process" reflects a standard generally associated with constitutional law. Although the IDEA is a statute, by writing the term into the IDEA, Congress clearly and unambiguously incorporated the due process standard into the statutory scheme and, thus, established an equivalent level of protection at administrative hearings under the IDEA. As this Court has explained:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, *it presumably knows and adopts the cluster of ideas that were attached to each borrowed word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Evans v. United States, 504 U.S. 255, 259 (1992) (emphasis added) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).[25] The same principle applies here. In using the familiar term "due process," Congress knew and adopted the "cluster of ideas" attached to those words, and it directed courts where to look in filling the interstices of the IDEA's protections.[26]

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[25] Congress' intent to incorporate a constitutional standard into its statute is also consistent with the fact that Congress understood itself to be addressing an issue of constitutional proportions. *See* Education for All Handicapped Children Act, Pub. L. No. 94-142, § 3(a), 89 Stat. 75 (1975) (declaring that the purpose of the statute – a predecessor to the IDEA – was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure *equal protection of the law*.") (emphasis added); *see also* Brief for the Arc of the United States, *et al.* at 20-22 (discussing legislative history showing constitutional concerns behind the IDEA).

Applying the due process standard to administrative hearings under the IDEA calls for using the test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which explains that "identification of the specific dictates of due process generally requires consideration of three distinct factors." *Id.* at 335. Those factors are:

> [1] First, the *private interest* that will be affected by the official action;
>
> [2] Second, the *risk of an erroneous deprivation* of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> [3] Finally, the *Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (emphasis added).[27]

In the context of the IDEA, all three factors point in the same direction. They argue for placing the burden of proof on the school district:

1. The "private interest" that will be affected is the free appropriate public education of a child with disabilities. This is the very interest that Congress intended to secure when it enacted the IDEA, and it is very substantial.

2. The "risk of erroneous deprivation" varies greatly, depending whether the burden of proof is placed on the parents or the school district. Because the level of proof is a preponderance of evidence, the allocation of the burden will affect the outcome of administrative hearings only in those cases where the evidence is in equipoise – that is, where the evidence that an IEP is appropriate is just as strong as the evidence that it is inappropriate. In such cases, there will be a fifty percent chance of an actual mistake in the hearing officer's decision, whichever way he decides; however, as *Mathews* explains, at this second step of the analysis, only the "private interest" is considered. Thus, the focus is on the education of the child.

If the evidence is in equipoise and the burden is placed on the parents, then the ruling will be in favor of the school district. There is a fifty percent chance that such a ruling will deprive the child of an appropriate education. Conversely, if the burden is placed on the school district, the ruling will be for the parents and the child will never be deprived of an appropriate education. Or, in the words of *Mathews*, if the burden is placed on the parents, the "risk of an erroneous deprivation" will be very high. Similarly, the value of the "substitute procedural safeguard" is also very high, because placing the burden on the school district safely eliminates the chance of such an erroneous deprivation.

3. The "government's interest" in these cases is twofold. First, the school district may have an interest in avoiding the expenditure of any additional resources that

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[26] Even without Congress' use of this term, due process would be required at IDEA hearings as a matter of constitutional law. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to public education as a property interest which is protected by the Due Process Clause. . . .")

[27] As two members of the Court more recently noted, "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases." *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J., joined by Souter, J., concurring).

would be associated with providing the services in dispute.[28] Second, under the IDEA, the government – local, state and national – also has an interest making sure that the child receives an appropriate education. This second governmental interest parallels the interest of the child and, thus, will be harmed if the parents must bear the burden of proof. These two separate governmental interests, on balance, weigh in favor of ensuring the child an appropriate education. As *Mills* explained, "the [government's] interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." *Mills,* 348 F. Supp. at 876 (citing *Goldberg v. Kelley*, 397 U.S. 254, 266 (1969) (holding that State's interest in avoiding erroneous termination of welfare benefits "clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens")). Thus, the third *Mathews* factor – like the first two – favors placing the burden on the school district.

The result of this *Mathews* analysis is consistent with this Court's express articulation of the relationship between due process and the burden of proof. "[D]ue process places a heightened burden of proof *on the State* in civil proceedings in which the 'individual interests at stake . . . are both *particularly important* and *more substantial than mere loss of money*.'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)) (other internal quotation marks and citations omitted) (emphasis added). When this standard is applied to the IDEA, it is clear that the "individual interest" at stake – securing an appropriate education for a child with

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[28] These additional resources often will have only a marginal impact on the government. Providing a few more hours of therapy each week, placing the child in a smaller classroom or providing some other accommodation easily within reach of the public school is often all that is required to make the difference between success and failure.

disabilities – is both "particularly important" and "more substantial than mere loss of money." While the *level* of proof is not at issue here, the *burden* of proof still must rest on the government – not the citizen – in order to comply with due process.

Such an allocation of the burden also mirrors the result in the two landmark disability rights cases that preceded the enactment of the IDEA, *Mills* and *PARC*. *See supra* at 4-5. In resolving constitutional challenges to discrimination against children with disabilities, both *Mills* and *PARC* required individualized hearings governed by due process, where the burden of proof was placed on the school district. *Mills*, 348 F. Supp. at 875-76, 881; *PARC*, 343 F. Supp. at 303, 305. As this Court has acknowledged, "the principles which [*Mills* and *PARC*] established are the principles which, to a significant extent, guided the drafters of the [IDEA]." *Rowley*, 458 U.S. at 194. Being thus guided by *Mills* and *PARC*, those drafters would hardly be surprised if this Court, like *Mills* and *PARC*, were to construe due process as placing the burden upon the school district.

This result is also reinforced by this Court's decisions in both *Burlington* and *Rowley*. Addressing in *Burlington* another IDEA safeguard (the "stay-put" requirement), the Court said: "We note that § 1415(e)(3) is located in a *section* detailing procedural safeguards which are largely for the *benefit of the parents and the child*." *Burlington*, 471 U.S. at 373. The section to which the Court was referring – § 1415 – is the same section where the requirement for "due process" is found.[29] Thus, it is also largely for the benefit of parents and children. Placing the burden of proof on the school district is consistent with the predominant congressional purpose. Placing the burden on the parents is not.

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[29] *See, e.g.*, 20 U.S.C. § 1415(a) (requiring state and local procedures *"to ensure that children with disabilities and their parents are guaranteed procedural safeguards* with respect to the provision of a free appropriate public education.") (emphasis added).

In *Rowley*, the Court had this to say:

> [A] court's inquiry [into suits brought under the IDEA] . . . will require a court not only *to satisfy itself* that the State has adopted the state plan, policies, and assurances required by the Act, but also *to determine* that the State has created an IEP for the child in question which conforms with the requirements of [the IDEA].

Rowley, 458 U.S. at 206 and n.27 (emphasis added).

To say that a court must "satisfy itself" and "determine" that the school district has complied with the IDEA is to say that there must be an *affirmative showing* of such compliance; and to require an affirmative showing is tantamount to requiring the party having the *duty* of compliance – *i.e.* the school district – to bear the burden of proof, even when the parents are the ones who initiated the complaint.

In sum, by deliberately incorporating concepts of due process into the IDEA, Congress made the allocation of the burden subject to the same principles that guide a due process analysis in other contexts. When these principles are applied to administrative hearings, it is clear that the school district must bear the burden of proof.

II. "POLICY AND FAIRNESS" REQUIRE THE BURDEN TO BE PLACED ON THE SCHOOL DISTRICT.

Even if the statutory requirement for "due process" were not a factor, the principles that govern allocation of the burden of proof would still require the burden to be placed on the school district.[30] As this Court has noted, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of *policy and fairness* based on experience in the different situations." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (internal quotation marks and citation omitted) (emphasis added) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)).

The Fourth Circuit acknowledged the relevance of this principle, Pet. App. 6, but failed to recognize its implications. As the following discussions will show, both "policy and fairness" require the school district to bear the burden. First, the policies underlying the IDEA are advanced by increasing the ability of parents to hold the school district accountable. Second, the consequences of an erroneous decision are much more onerous for the child than they are for the school district. Third, school districts have more access to – and control over – relevant facts and witnesses. Considered individually, each of these factors provides a compelling reason for placing the burden on the school district. Considered collectively, they make the case irrefutable.

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[30] *See, e.g.*, Brief of Various Autism Organizations at 8-15 (setting forth six separate considerations that compel placing the burden of proof on school districts).

A. Placing the Burden on the School District Advances the Congressional Policies Underlying the IDEA

Aptly described by the United States as "an important civil rights statute for children with disabilities," U.S. 2000 *Amicus* Brief at 1, the IDEA arose as our nation's response to the discrimination that these children once suffered at the hands of many local school authorities. *See supra* 4-5. As such, the IDEA has two great, overarching purposes. The first is to institute a system where school districts not only must end such discrimination, but must affirmatively provide every child with disabilities an appropriate education suitable for his or her individual needs. The second purpose is to empower parents to hold school districts accountable for the faithful performance of these duties, not only by giving parents an equal seat at the table when their child's education program is developed, but also by giving them the right to an "impartial due process hearing" in the event of an impasse.

These purposes are advanced by placing the burden on the school district, the party meant to be held accountable under the IDEA. They are not advanced by placing the burden on the parents, the parties meant to be protected. As explained by the United States in the court of appeals, "allocation of the burden of proof to the school is correct because it furthers the [IDEA's] mandate that schools provide FAPE [a free appropriate public education] to children with disabilities." U.S. 2000 *Amicus* Brief at 6. The United States then went on to say:

> [B]ecause the IDEA contemplates that the school would take the lead in . . . proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process administrative hearing that the proposed IEP will provide FAPE to a child with a disability.

Id. at 12. On the other hand, "allocating the burden of proof to the parents would undermine the IDEA's provisions that ensure parents meaningful participation in developing the IEP." *Id.* at 12. Judge Luttig concurred with this assessment, concluding that "the policies behind the IDEA indisputably argue in favor of placing the burden of proof with the school district." Pet. App. 17 (Luttig, J., dissenting). It is an argument made even more convincing by the persistence of the prejudice and bias that prompted Congress to enact the IDEA. *See* Brief for the Arc of the United States, *et al.* at 22 (explaining that "[t]he same discriminatory conditions that impelled Congress to enact the IDEA continue to exist.").[31]

Unmoved by the policy argument, the Fourth Circuit still did not dispute it. Instead, the panel majority adhered to the "tendency" to place the burden of proof on the party seeking a change, Pet. App. 6, and it offered the analogy of other civil rights statutes where the burden is borne by the plaintiff. Pet. App. 8-9. The analogy is misplaced. Discrimination takes many forms, as do the measures adopted by Congress to combat it. The requirements of the IDEA set this law apart from other civil rights statutes and make them poor analogies for allocating the burden here. Other civil rights statutes prohibit discrimination, but most of them differ from the IDEA in that they do not impose affirmative obligations. While there are other civil rights statutes that impose affirmative obligations – *e.g.*, Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* – those statutes can be readily distinguished. First, such other statutes typically apply across the board to a wide range of businesses and institutions having a multitude of purposes and missions. Unlike the IDEA, they are not focused on a narrow category of institutions – *e.g.*, public schools – whose purpose is directed to serving the individuals whose rights are at issue. In other words, while a business subject to the ADA must provide certain accommodations to its employees, serving the welfare of those employees is not the *raison d'etre* of the business. The *purpose* of the business is to produce a product or service and make a profit. For public schools, on the other hand, educating children *is* their *raison d'etre*. To say that a student or his parents should have the burden of proof under the IDEA, because an employee may have that burden under the ADA, is comparing apples and oranges.

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[31] Undoubtedly, some local school authorities have warmly embraced their new obligations, but others skimpily withhold the full measure the law requires while others verge on open defiance. *See, e.g., Emma C. v. Eastin*, No. C96-4179, 2001 U.S. Dist. LEXIS 16099 (N.D. Cal. Oct. 4, 2001) (holding local school district in contempt for failure to implement court-ordered plan to remedy widespread violations of the IDEA).

Second, other statutes that impose affirmative obligations typically require the business or institution to make a reasonable response to *requests* for an accommodation. The IDEA goes much further and requires the school district to *seek out* children who need special education services and *ensure* that they receive the education to which the law entitles them. *See* Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 8-9. The other statutes typically do not require a formal collaborative process, such as the highly detailed procedure that the IDEA requires in the development of an IEP. Nor do other statutes typically provide an administrative hearing to resolve any impasse. In each of these ways, the affirmative obligation imposed by the IDEA is different from the duty to accommodate arising under other statutes. It is perfectly consistent with these differences that the burden of proof be different as well.

It is also significant that the *fora* in which the burdens apply are also different. In the case at bar, the forum where the burden is at issue is an administrative hearing, not a state or federal court, where claims would be brought for adjudication under other federal statutes. While a hearing officer's decision may be appealed to such a court, the question of who bears the burden if the case reaches court is not an issue in this case. To require parents who initiate a complaint to bear the burden of proof at the *administrative* level under the IDEA, because a plaintiff suing under a different statute may have to bear the burden in *court*, is a *non-sequitur*.

The difficulties parents encounter in securing an appropriate education for their child will be either exacerbated or ameliorated by whether they bear the burden of proof in a due process hearing. But there is more. The allocation of the burden also affects the outcome of cases that never reach the hearing stage.[32] When parents and the school district sit down to negotiate a child's IEP, an awareness of who will bear the burden if there is an impasse can significantly affect the negotiation dynamics. Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies. On the other hand, "assigning the burden of proof to the school . . . serves as an additional incentive for school officials to draft IEPs that provide FAPE to children with disabilities." U.S. 2000 *Amicus* Brief at 12. Moreover, placing the burden on the school district is consistent with "Congress' effort to *maximize* parental involvement in the education of each handicapped child." *Rowley*, 458 U.S. at 183 n.6 (emphasis added).[33] For this reason, as well, policy considerations strongly favor the rule adopted by the majority of circuits.

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[32] Many more hearings are requested than are actually held. *See* Government Accounting Office, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) at 13 (noting that 11,068 hearings were requested in 2000, but only 3,020 were held). Such a discrepancy suggests that many parents find the process too daunting and simply capitulate.

B. The Sharply Different Consequences of an Erroneous Decision Require the School District to Bear the Burden of Proof.

Allocating the burden of proof also must be guided by "fairness based on experience." *Keyes*, 413 U.S. at 209. The goal of fairness requires a balancing of competing equities. In making decisions about the burden of proof – especially where government is a party – this means considering "the consequences of an erroneous factual determination." *In re Winship*, 397 U.S. 358, 373 (1970) (Harlan, J., concurring). Indeed, concerns about the consequences of such error are found at the heart of many of this Court's cases about the burden of proof. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (withdrawal of life-support); *Santosky v. Kramer*, 455 U.S. 745, 765-66 (1982) (termination of parental rights); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966) (deportation). While these concerns about the consequences of error have often affected the *level* of proof required (an issue not present here), the same concerns have direct relevance to the *allocation* of the burden between citizens and their government.

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[33] *See* Brief for the Arc of the United States, *et al.* at 26-28 (discussing how allocation of the burden of proof affects parties in earlier stages of IEP development process); Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 20-23 (same).

When the evidence at a due process hearing is in equipoise, the ruling should be for the parents because of the sharply different consequences of an erroneous decision. The child will suffer far more harm if contested services are erroneously denied, than the local school district will suffer if those services are erroneously ordered.[34] Given this discrepancy, the burden of proof – sometimes called the risk of non-persuasion – must be placed on the school district.

If a child is mistakenly denied the services he needs, it can cause "a substantial setback in the child's development." 121 Cong. Rec. 37412, 37416 (daily ed. Nov. 19, 1975) (statement of Sen. Stafford). Moreover, there may not be a second chance to correct the error. Even if the mistake is recognized later in the child's school career, the harm caused by the delay is likely to require far more intensive intervention, and it will often be irreparable. As explained by the First Circuit:

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[34] While there may be exceptions to this observation, burdens of proof are not allocated based on exceptions:

> Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.' Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (quoting *Mathews*, 424 U.S. at 344) (emphasis added in *Santosky*).

> Current research indicates that full development of reading and other skills will more likely occur with learning disabled children . . . if adequate remedial services are provided in the early primary grades. Later intervention generally appears to require special services over a longer period of time to achieve a similar rate of remediation. Some skills must be learned early in the brain's maturation process for them to be learned well, or in some cases, at all. *Delay in remedial teaching is therefore likely to be highly injurious to such children.*

Town of Burlington v. Department of Education, 736 F.2d 773, 798 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (emphasis added).

For some disabilities, a delay in services can be especially devastating. One such example is autism,[35] a disability of increasing prevalence.[36] "[F]or children who suffer from autism, there is a *small, but vital, window of opportunity* in which they can effectively learn. Such period is generally between the ages of five and eight years old." *Lawyer v. Chesterfield*, 19 IDELR 904 (E.D. Va. 1993) (emphasis added) (basing decision on expert testimony).[37] A similar example can be found among some

children with severe hearing loss. *E.g., Board of Educ. v. Jeff S.*, 184 F. Supp. 2d 790, 793 (C.D. Ill. 2002) ("There is a critical window of opportunity for a child with a cochlear implant to learn to hear and speak during which [auditory verbal therapy] is implemented."). Similar examples can also be found among the myriad of other disabilities afflicting children served by the IDEA. *See supra* at 6-7. But whether the harm caused by delay is simply difficult to repair – or is actually irreparable – the point is the same: if the evidence is in equipoise, a judgment in favor of the school district will risk substantial harm to the education of the child.[38]

On the other hand, where the evidence is evenly balanced, a judgment in favor of the parents will typically risk little or no harm to the school district. Schools are often able to leverage a marginal increase in resources into an enormous difference in the child's outcome.[39] In the case at bar, for example, the school district could have offered Brian, in the beginning, the specialized program that it eventually agreed to provide – but initially refused. Fortunately for Brian, his parents had the means to place him in a private school where he could obtain the services he needed until the school district changed its mind. See *supra* at 13. But, most parents will not have this option. For the vast majority of children with disabilities, the

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[35] "Autism adversely impacts the normal development of the brain in the areas of social interaction and communication skills. Individuals suffering from autism experience, *inter alia*, preoccupation with inner thoughts, daydreams, and fantasies, and they have difficulty communicating." *MM v. Sch. Dist.*, 303 F.3d 523, 528 n.6 (4th Cir. 2002).

[36] For example, among the age group 6 through 11, the number of children with autism served by the IDEA increased more then six-fold over ten years, growing from 13,716 in 1994 to 85,995 in 2003. *<www.ideadata.org/tables27th/ar_aa9.htm>*.

[37] *Accord JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) ("children have a great window of opportunity for language learning that begins to close by age eight or nine, and thus, 'if you mark time with a child who has autism, you lose. . . .'") (discussing testimony of Ronald David, M.D., associate clinical professor of pediatrics at the Medical College of Virginia, and an expert in pediatric neurology and autism).

(Continued on following page)

[38] Indeed, because later intervention is typically more expensive than early intervention, *see Burlington*, 736 F.2d at 798, a judgment in favor of the parents will often save the school district money in the long run.

[39] Of course, even when the additional expenditure is substantial, the interest of the child in an appropriate education must be paramount. *E.g., Mills*, 348 F. Supp. at 876; *see also Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

costs of an erroneous decision will not be paid in monetary terms, but in the squandering of human potential.

Our law always has reflected a special solicitude for children. *E.g.*, *Ridgway v. Ridgway*, 454 U.S. 46, 69 (1981) (Powell, J., joined by Rehnquist, J., dissenting). It also reflects a special solicitude for the "primary role of the parents in the upbringing of their children," a role "now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Such solicitude makes it especially appropriate to rule in favor of the child – and his parents – when the evidence is in equipoise.[40] Indeed, the principle that the law should show special concern for children is rooted in the fact that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, it is not just the children who will suffer from erroneous decisions in favor of school districts. Society at large will also pay the price. As this Court has already recognized, "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." *Rowley*, 458 U.S. 176, 201 n.23 (quoting 121 Cong. Rec. 19492) (1975) (remarks of Sen. Williams)).[41]

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[40] "Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding." *Doe v. Board of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998). For the most part, then "references to parents are best understood as accommodations to the fact of the child's incapacity." *Id.*

[41] *See, e.g.*, Brief of Various Autism Organizations at 25 (noting the growing need for institutional care for adolescents with autism and reporting estimates of long-term savings where there is "widespread, early and effective" intervention).

Conversely, denying such service – even by a well-meaning mistake – will consign many of these individuals to a life of dependency. For this reason, too, when the evidence is evenly balanced, the judgment of the hearing officer should favor the parents.

C. School Districts Have More Access to – and Control Over – Relevant Facts and Witnesses

Achieving "fairness based on experience," *Keyes*, 413 U.S. at 209, often means placing the burden of proof on the party having superior access to and control over key evidence. As this Court has explained, "[t]he *ordinary rule*, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) (emphasis added). Indeed, it is "entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation to demonstrate [the] facts. . . . Such was the rule at common law." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993) (citing authorities). *See* J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

Adhering to this principle, lower courts placing the burden of proof on the school district have often explained their decisions by noting that school officials have greater access to and control over evidence pertaining to the appropriateness of its proposed IEP. In *Lascari*, the Supreme Court of New Jersey explained that requiring the school district to bear the burden is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens." 560 A.2d 1180, 1188 (N.J. 1989). As *Lascari* observed:

> The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child-study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. . . . By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

Id.

The Third Circuit used a similar rationale. As it explained:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

Oberti, 995 F.2d at 1219 (placing the burden on the school district in terms broad enough to encompass both administrative and judicial proceedings).

The same rationale figured prominently in the case at bar when the district court relied on *Lascari* in reaching its decision to place the burden on the school district, Pet. App. 36-39, and when Judge Luttig penned his dissent at

the court of appeals. As he noted, "[p]arents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children." Pet. App. 19.

The approach followed by *Lascari*, *Oberti*, the district court and Judge Luttig mirrors the assessment offered by the U.S. Department of Education and the U.S. Department of Justice, Civil Rights Division. As they explained in 2000: "Fairness principles also call for assigning the burden of proof to the party that controls the essential evidence or possesses superior knowledge of the facts, *which in this case is the school.*" U.S. 2000 *Amicus* Brief at 13 (emphasis added).

The United States was correct in its assessment. The school district typically has a better opportunity to observe the child in an educational setting and to interpret those observations. School districts typically have employees or consultants whom they may readily call upon to present expert testimony; and, while some parents may have the ability to retain their own outside experts, most will not. Parents may have access to their child's school records; however, the school district in large measure controls what records are created, what information is included in those records and what information is left for presentation *ore tenus* or not mentioned at all. And parents do not even have a right to observe the educational placement proposed by the school district.[42] Finally, the school district is in a position to explain the range of educational options available and to demonstrate why it has chosen a particular option for its proposed IEP.

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[42] *See, e.g.*, Letter to S. Mamas from Office of Special Education Programs (May 26, 2004), 42 IDELR 10 ("[N]either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement."); *accord Hanson v. Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002) ("There is no language in the IDEA requiring a school board to allow parents to visit the school of the proposed placement.").

Of course, there will be parents from time to time who come to the table with a high degree of resources, knowledge and sophistication; however, such parents are the exception, not the rule. "For the vast majority of parents . . . , the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering." Pet. App. 20 (Luttig, J., dissenting). It is, of course, the "*generality* of cases, not the rare exceptions" that determine how the burden of proof will be shaped. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982) (quoting *Mathews*, 424 U.S. at 344) (emphasis added in *Santosky*).

Moreover, even when parents are sophisticated, school districts remain uniquely positioned to collect and evaluate information about how well their programs have worked for students having similar disabilities. If they are developed and presented, such professional program assessments can be very useful to a hearing officer in determining whether a proposed placement or a proposed level of services is appropriate for a particular child. On the other hand, parents rarely have experience with IEPs outside their own family and, because of privacy concerns, cannot realistically obtain information about whether the school district has succeeded with other children to whom similar programs were provided. *See, e.g.*, The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1) (imposing non-disclosure requirements on student records as condition of receiving federal funds).

In another situation involving government programs for individuals with disabilities, the government is required to bear the burden of proof where relevant information is peculiarly available to it. This useful analogy is found in the law governing Social Security disability. Once a claimant makes a certain showing of eligibility for benefits, "the burden of proof shifts to the Secretary [of Health and Human Services] to show that the claimant, given her age, education and work experience, has the capacity to perform specific jobs that exist in the national economy." *Rossi v. Califano*, 602 F.2d 55, 57 (3d Cir. 1979).[43]

Placing this burden on the government is "not statutory, but is a long-standing judicial gloss on the Social Security Act." *Walker v. Bowen*, 834 F.2d 635, 640 n.3 (7th Cir. 1987). It reflects the common sense view that the government is in a far better position than the individual citizen to collect and evaluate data about the jobs that are available in the national economy and what may be suited to a particular individual. As the Third Circuit explained:

> [I]nformation as to the availability of jobs in the national economy is sophisticated information that most individuals do not have the resources to prove or disprove. The Secretary, on the other hand, has vast resources and information at his disposal. Thus, considerations of fairness and policy require that the Secretary bear the risk of non-persuasion on the element of disability on

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[43] Other circuits reaching the same result include: *Butts v. Barnhart*, 388 F.3d 377 (2d Cir. 2004); *Eichelberger v. Barnhart*, 390 F.3d 584 (8th Cir. 2004); *Jones v. Commissioner of Social Security*, 336 F.3d 469 (6th Cir. 2003); *Thomas v. Barnhart*, 278 F.3d 947 (9th Cir. 2002); *Brown v. Arpel*, 192 F.3d 492 (5th Cir. 1999); *Lewis v. Weinberger*, 541 F.2d 417 (4th Cir. 1976); *Hernandez v. Weinberger*, 493 F.2d 1120 (1st Cir. 1976).

> which the Secretary is in a better position than the claimant to introduce evidence.

Torres v. Schweiker, 682 F.2d 109, 111-12 (3d Cir. 1982).

So, too, the school district has sophisticated information that most individuals do not have available to them. Under the IDEA, where eligibility for services is established (a factor not at issue here), the government should bear the burden of showing that the program it has proposed is suitable for the child. Indeed, the case for imposing such a burden on the school district is even stronger than the case for imposing it on the Secretary. Under Social Security law, the Secretary has no obligation to *provide* the claimant with an appropriate job, whereas the school district does have the obligation to provide the child with an appropriate education. The school district should be required to step forward and show why the program it has devised satisfies its legal obligation.

Under the IDEA, the school district has an affirmative legal duty to develop an appropriate IEP. It is not supposed to propose an IEP – much less *insist* upon its proposal – without a sound basis. If the school district has fulfilled this duty, it will have its proof readily available, and it ought not to be reluctant about going before a hearing officer to justify its position. This is especially so given that the hearing officer is "a representative of the state presumed to have both the educational expertise and the ability to resolve questions of educational methodology." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir. 2004). Under the IDEA, a State must have in effect "policies and procedures to *ensure* that . . . [a] free appropriate public education is available to all children with disabilities residing in the State. . . . " 20 U.S.C. § 1412(a). To require the school district to bear the burden of proof is simply to require it to provide the hearing officer, in individual cases, the same sort of assurances

that the State must make on a larger scale as a condition of participation.

At the end of the day, "the school district is . . . in a far better position to demonstrate that it has fulfilled this obligation [to develop a suitable IEP] than the disabled student's parents are in to show that the school district has failed to do so." Pet. App. 16 (Luttig, J., dissenting). With all the advantages at its command, if the school district cannot show that it has proposed an appropriate IEP, it is only fair for the judgment to go against it.

III. THE RATIONALE USED BY THE FOURTH CIRCUIT IS FLAWED – THE "PLAYING FIELD" IS NOT LEVEL.

The Fourth Circuit did not offer any reason for placing the burden on the parents, other than its failure to see any reason for placing it on the school district. *See* Pet. App. 15. Nor did the Fourth Circuit deny that the school district has superior access to evidence about the appropriateness of its proposed IEP. *See* Pet. App. 9. Instead, the decision below reviewed other protections available to parents under the IDEA and concluded that the "playing field" is "level" without placing the burden of proof on the school district. Pet. App. 9. This approach is flawed.

To begin, the principal protections available to parents in an administrative hearing – notices, right to counsel, limited discovery rights – are comparable to (or less than) what litigants enjoy in *judicial* proceedings.[44] These protections do not vitiate the rule that imposes the burden on the party having peculiar knowledge of the facts. They do not do so in a judicial setting; they ought not do so in an administrative setting, either.

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[44] Other protections listed by the Fourth Circuit apply to stages in the IEP process *before* the hearing stage. For example, parents have the right to participate in IEP meetings, to request an independent evaluation, to review school records and to seek mediation. Yet, when efforts at joint development of an IEP reach an impasse, these pre-hearing protections are hardly sufficient to eliminate the natural advantages the school district will enjoy in an adversarial hearing.

Moreover, in matters affecting children, there is an inherent asymmetry between parents and the school district, which the Fourth Circuit unnecessarily turned into a disadvantage for parents. When parents and school officials sit down to develop an IEP, they come to the table – in the eyes of the law – as "equal partners." USDOE Question 9, *supra*. Similarly, when there is an impasse, either side has the right to request an administrative hearing. *See supra* at 7. As a practical matter, however, it is almost always the parents who make the request. The school district has little incentive to initiate the process. Without a formal IEP in place, the school district may simply withhold the contested services – perhaps, all special education services – and thereby have its own way, or else maneuver the parents into making the first move. In a setting where, as the Fourth Circuit acknowledges, the playing field is *supposed* to be level, this Court should not allow one side in the controversy to impose the burden of proof on the other by the use of such a tactic. This is especially so when the tactic is employed by a public agency entrusted by parents with the education of their children. It is even more inappropriate when the *reason* for allowing such a tactic to succeed would simply be the "tendency" or "tradition" of placing the burden on the side first challenging the other. *See* Pet. App. at 6, 15 (panel majority).

Other advantages are also available to the school district. A few examples will illustrate the point.[45] Many

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[45] *See* Brief for the Arc of the United States at 9-18 (discussing in detail multiple advantages that school districts enjoy over parents);

(Continued on following page)

school districts have attorneys on staff. Others have substantial budgets for hiring outside counsel.[46] For parents, engaging an attorney can often be a daunting task and, while Brian's parents were not deterred by this obstacle, many parents will be unable to find – or afford – counsel skilled in this area of the law. Thus, it is not surprising that schools are "much more likely to bring an attorney to a hearing than parents." 150 Cong. Rec. S5350-51 (daily ed. May 12, 2004) (Statement of Sen. Kennedy).[47]

Similarly, school districts typically have ready access to expert witnesses, often through their own employees but sometimes through expensive outside consultants.[48] On the other hand, parents must find and retain experts, paying for them out of far more limited budgets. In some circuits, parents who prevail may recoup these expenditures as part of the costs.[49] Yet, in other circuits, such

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Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates *et al.* at 16-23 (same).

[46] *See, e.g.*, Atlanta Law Firm Charges to County Top $1.7 Million, the Chattanoogan.com (Mar. 14, 2005) (reporting that the school system of Hamilton County, Tennessee has incurred more than $1.7 million in legal fees in one special education case, which is still on-going) *available at* <www.chattanoogan.com/articles/article_63675.asp> (visited Apr. 23, 2005).

[47] Senator Kennedy's assessment is based on 2003 data from the States, calculating what percentage of the time parents and schools, respectively, used attorneys. States and percentages listed by Senator Kennedy were: California: parents (21%), schools (42%); Missouri: parents (60%), schools (87%); Connecticut: parents (65%), schools (95%); Illinois: parents (35%), schools (91%); New York: parents (31%), schools (100%). 150 Cong. Rec. S5350-51.

[48] *See, e.g.*, the Chattanooga.com, *supra* (reporting that Hamilton County incurred more than $690,000 in expert witness fees and expenses in the same case).

[49] *E.g.*, *Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3d Cir. 1988) (allowing parents who prevail compensation for expert witness fees); *Murphy v. Arlington Central Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005) (same).

compensation is not available.[50] Even where parents are allowed such compensation, cutting costs on expert witnesses may be necessary to hedge against the possibility of an adverse decision, to pay for services the school district will not provide or simply because parents do not have the money. In this way, too, the playing field is not level.

The ability of the parties to know about – and to limit – each other's case is also skewed in favor of the school district. When a party – typically the parents – requests a hearing, that party becomes obligated to provide a detailed statement of its case. This statement must describe "the nature of the problem" with the proposed IEP as well as "facts relating to such problem." 20 U.S.C. § 1415(b)(7)(A)(ii)(III). The initiating party also must provide "a proposed resolution of the problem to the extent known and available" at the time. *Id.* at § 1415(b)(7)(A)(ii)(IV). Parents who provide such a statement of their case, but seek to stray from it at the hearing, are likely to find themselves facing a successful objection from the school district. Such pleading requirement would seem unremarkable if the other party – typically the school district – were required to respond with a competing pleading. However, there is no such requirement. Thus, the school district has both a head start and wider latitude in getting ready for the hearing. For the school district to enjoy such advantages in the preparation of its case is yet another reason why the school district should be prepared to prove that case.

While many of the disadvantages experienced by parents fall upon families of all economic backgrounds, they fall most heavily upon families with lower incomes. As explained by the U.S. Department of Education:

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[50] *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (denying compensation for expert witnesses) and *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003) (same).

> "Due process hearings are *expensive* for all parties, time-consuming, and are not undertaken lightly, so due process hearings are universally understood to be a marker of serious unresolved differences about a student's need for special education and related services or the nature or location of services."

Government Accounting Office, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) ("GAO Report") at 1, 29 (reproducing letter from Assistant Secretary of Education, R.H. Pasternack, Ph.D.) (emphasis added). Consistent with this observation about expense, the GAO reports a "significant relationship" between household incomes and hearing requests. GAO Report at 15 n.22. Not surprisingly, households with lower incomes are less likely than households with higher incomes to request a due process hearing. *Id.* The problem is compounded by the fact that a high percentage of children with disabilities (24 percent) come from households in poverty. *See* MARY WAGNOR & JOSE BLACKORBY, OVERVIEW OF FINDINGS FROM WAVE 1 OF THE SPECIAL EDUCATION ELEMENTARY LONGITUDINAL STUDY (SEELS) (2004) at 5, *available at* http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf (reporting results of study implemented by U.S. Department of Education). Minority children with disabilities also face special challenges. *See* 20 U.S.C. § 1400(c)(12)(A) (2005) (formerly § 1400(c)(8)(A)). ("[G]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.").

It is *these* families – the ones most in need of the services of public schools – who are least able to muster the resources to overcome the burden of proof placed upon them by the decision below. Bearing in mind what Judge

Luttig called "the full mix of parents," Pet. App. at 20, it is especially inappropriate to treat the playing field as level.

In sum, contrary to the assessment offered by the Fourth Circuit, the playing field is tilted against parents. To make them bear the burden of proof, based on a belief that the field is somehow level, is simply unrealistic. The Fourth Circuit's decision is flawed. In IDEA administrative hearings, the "tendency" or "tradition" of assigning the burden to the party who initiates the litigation must give way to concerns about "policy and fairness." *Keyes*, 413 U.S. at 209. The burden must be fixed upon the school district.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRIAN SCHAFFER, a minor,
by his parents and next
friends, Jocelyn Schaeffer
and Martin Schaeffer;
JOCELYN SCHAFFER; and
MARTIN SCHAFFER

William H. Hurd*
Siran S. Faulders
Paige S. Fitzgerald
Troutman Sanders, LLP
1111 East Main Street
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)

Michael J. Eig
Haylie M. Iseman
Michael J. Eig &
Associates, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

**Counsel of Record*

April 29, 2005

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20 USCS § 1400 (2005)

§ 1400. Short title; table of contents; findings; purposes [This section takes effect on July 1, 2005, pursuant to § 302(a) of Act Dec. 3, 2004, P.L. 108-446.]

(a) Short title. This title [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this title [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this title [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have

meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this title [20 USCS §§ 1400 et seq.] with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10) (A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11) (A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12) (A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13) (A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this title [20 USCS §§ 1400 et seq.], peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are –

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, as added Dec. 3, 2004, P.L. 108-446, Title I, § 101, 118 Stat. 2647.)

20 USCS § 1415 (2005)

§ 1415. Procedural safeguards [This section takes effect on July 1, 2005, pursuant to § 302(a) of Act Dec. 3, 2004, P.L. 108-446.]

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2) (A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of –

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency –

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint –

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7) (A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential) –

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include –

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements.

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include –

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice.

(A) Complaint. The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint.

(i) Local educational agency response.

(I) In general. If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include –

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency. A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint [sic] notice was insufficient where appropriate.

(ii) Other party response. Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint [sic] a response that specifically addresses the issues raised in the complaint.

(C) Timing. The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination. Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice.

(i) In general. A party may amend its due process complaint notice only if –

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline. The applicable timeline for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice.

(1) In general.

(A) Copy to parents. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents –

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website. A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it

clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including –

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process –

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party. A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 671 or 672 [20 USCS § 1471 or 1472]; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators. The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs. The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement. In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that –

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing.

(1) In general.

(A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session.

(i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing. If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall commence.

(iii) Written settlement agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is –

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period. If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations.

(A) In general. Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing.

(A) Person conducting hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum –

(i) not be –

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this

title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal.

(1) In general. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision. The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions –

(A) shall be made available to the public consistent with the requirements of section 617(b) [20 USCS § 1417(b)] (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)].

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(C) Additional requirements. In any action brought under this paragraph, the court –

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees.

(i) In general. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction. Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) In general. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by *Rule 68 of the Federal Rules of Civil Procedure* or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP team meetings. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints. A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered –

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that –

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A), the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)] although it may be provided in an interim alternative educational setting.

(D) Services. A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall –

(i) continue to receive educational services, as provided in section 612(a)(1) [20 USCS § 1412(a)(1)], so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall –

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child –

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification. Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting. The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal.

(A) In general. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer.

(i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may –

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals. When an appeal under paragraph (3) has been requested by either the parent or the local educational agency –

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred –

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 USCS § 1414(a)(1)(B)]; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception. A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 [20 USCS § 1414] or has refused services under this part [20 USCS §§ 1411 et seq.] or the child has been evaluated and it was determined that the child was not a child with a disability under this part [20 USCS §§ 1411 et seq.].

(D) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities.

(A) Rule of construction. Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records. An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions. In this subsection:

(A) Controlled substance. The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18, United States Code.

(D) Serious bodily injury. The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted

to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].

(n) Electronic mail. A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint. Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part B, § 615, as added Dec. 3, 2004, P.L. 108-446, Title I, § 101, 118 Stat. 2715.)

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34 C.F.R. § 300.7 (2005)

§ 300.7 Child with a disability.

* * *

(c) Definitions of disability terms. The terms used in this definition are defined as follows:

(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(ii) A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) Deafness means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) Emotional disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(5) Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) Multiple disabilities means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(8) Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

(10) Specific learning disability is defined as follows:

(i) General. The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

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IN THE

Supreme Court of the United States

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES; NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; NATIONAL CHILDREN'S LAW NETWORK; EDUCATION LAW CENTER OF NEW JERSEY; EDUCATION LAW CENTER OF PENNSYLVANIA; ALEXANDER GRAHAM BELL ASSOCIATION FOR THE DEAF AND HARD OF HEARING; BAZELON CENTER FOR MENTAL HEALTH LAW; CENTER FOR LAW AND EDUCATION; UNIVERSITY OF RICHMOND'S SCHOOL OF LAW DISABILITY LAW CLINIC; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; TASH, INC.; WESTERN LAW CENTER FOR DISABILITY RIGHTS SUPPORTING PETITIONERS

ANKUR J. GOEL
Counsel of Record
M. MILLER BAKER
KARLA L. PALMER
ERIK C. BAPTIST

MCDERMOTT, WILL & EMERY LLP
600 13th Street, N.W.
Washington, D.C. 20005
(202) 756-8000

Counsel for Amici Curiae

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INTERESTS OF AMICI

Amici are thirteen organizations of parents of children with disabilities, their families, their attorneys and advocates, their educational consultants, and people with disabilities, listed below.[1]

The Court's decision will affect all of the approximately 6.7 million children with disabilities in public schools,[2] comprising approximately thirteen percent of the student population.[3] The Fourth Circuit's decision to assign the burden of proof to parents in IDEA administrative hearings will have the effect of depriving children with disabilities of the special education services they desperately need and that Congress intended they be provided.

These children live with a broad range of disabilities, including autism, Down Syndrome, hearing loss or deafness, mental retardation, and muscular dystrophy. These obvious disabilities are usually known to the parents and school districts from the outset of the child's experience with the school system. Other children may experience disabilities that are more subtle, and that the school district itself identifies as the child gets older. Examples of difficulties that may become apparent during the child's school experience include such learning disabilities as dyslexia, and auditory processing disorders. Obvious or subtle, school districts have an affirmative obligation to locate, identify, and evaluate children with disabilities, including those in private schools and prisons, 20 U.S.C. § 1412(a)(3),[4] and provide a free appropriate public education to all children with disabilities. 20 U.S.C. § 1412(a)(1).

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] U.S. Department of Education, Office of Special Education Programs, Data Analysis System (reporting for 2003-04 school year), *available at* www.ideadata.org/tables27th/ar_aa7.htm and www.ideadata.org/tables27th/ar_aa9.htm (visited Apr. 16, 2005).

[3] Mary Wagner, et al., *The Children We Serve: The Demographic Characteristics Of Elementary And Middle School Students With Disabilities And Their Households (SEELS) 28* (September 2002).

As we discuss further below, statistics show that families of children with disabilities have dramatically higher rates of poverty and are less educated than the population as a whole. The population of students with disabilities includes children who are homeless, neglected, or abused. Placing the burden of proof on these families risks denying many of their children the free appropriate public education that Congress mandated.

A recent Maryland administrative case starkly revealed the impact of the burden of proof, in which a boy's guardian proceeded *pro se* and lost because:

> It was clear that the Guardian, although well-intentioned, did not know how to go about presenting evidence to support her complaint .... As the trier of fact I am prohibited from assisting any party in the presentation of his/her case, or from extending procedural leeway in proving his/her case.

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[4] The 2004 amendments, effective July 1, 2005, impose the further obligation to find homeless children and wards of the state who are disabled.

XXXX XXXX v. Baltimore City Pub. Sch., Order, OAH No.: MSDE-CITY-OT-200200192, Md. Office of Admin. Hearings (June 26, 2002).

The boy's sister, acting as his guardian, had sought assistance for her brother, a high school student, because he lacked skills necessary for daily, independent living. The Administrative Law Judge placed the burden of proof on the guardian, and required her to present her case first; the Baltimore County Public Schools presented *no* evidence. The ALJ rejected all of the guardian's proffered exhibits and granted summary judgment for the school district, noting that the guardian had failed to introduce any "competent" evidence.

Thus, when families bear the burden of proof the impact is felt most strongly by those who are least able to bear it. The consequence is that these children will not receive the special education services they need and Congress expected the school district to provide.

* * *

The Council of Parent Attorneys and Advocates is an independent, nonprofit organization of attorneys, advocates, and parents in 43 states and the District of Columbia who are routinely involved in special education due process hearings throughout the country.

The National Association of Protection and Advocacy Systems (NAPAS) provides special education representation to thousands of children and their families each year. NAPAS is the membership organization of the network of protection and advocacy (P&A) agencies. Located in all 50 states, the District of Columbia, Puerto Rico, and the federal territories, P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of all persons with disabilities in a variety of settings.

The American Association of People with Disabilities (AAPD) is the largest cross-disability membership organization in the United States with more than 110,000 members.

The National Children's Law Network is a partnership consisting of eight children's legal centers. The members, which spread across the country, include Public Counsel (California), Children and Family Justice Center of Northwestern School of Law (Illinois), Children's Law Center of Massachusetts, Children's Law Center of Minnesota, Just Children (Virginia), Oklahoma Lawyers for Children, Rocky Mountain Children's Law Center (Colorado), and Support Center for Child Advocates (Pennsylvania). Among other things, these organizations provide pro bono legal representation and support to the most at risk members of the school population, low-income children with disabilities.

The Education Law Center of New Jersey is a not-for-profit law firm in New Jersey specializing in education law. It serves approximately 600 individual clients each year, primarily in the area of special education law, including in administrative hearings.

The Education Law Center of Pennsylvania, an education advocacy organization supported in large part by Pennsylvania's Protection and Advocacy System, provides free legal assistance to children with disabilities and their families. In selected cases, it represents children and families at special education hearings and in court. Each year, it interacts with thousands of families and professionals through training and other outreach activities.

TASH, Inc., is an international membership association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the United States and members from thirty-eight countries worldwide.

Alexander Graham Bell Association for the Deaf and Hard of Hearing (AG Bell) serves parents of children who are deaf or hard of hearing, adults who are deaf or hard of hearing, educators of individuals who are deaf or hard of hearing and other interested person in every state, and reaches out to over 54 nations. As part of that advocacy, AG Bell represents parents in test cases throughout the country.

The Disability Law Clinic of the Children's Law Center of the University of Richmond's School of Law represents children and their parents in special education and juvenile court proceedings – hence, its interest in the outcome of this case.

The Center for Law and Education (CLE) of Boston and Washington, D.C. is a national advocacy organization that works with parents, advocates and educators to improve the quality of education for all students, and in particular, students from low-income families and communities. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities.

The Western Law Center for Disability Rights (WLCDR) is a non-profit organization that protects and enforces the civil rights of people with mental and physical disabilities. The WLCDR's Learning Rights Project advocates for special education services for children with learning disabilities who are from low-income and minority communities through litigation, administrative representation, mediation, and education.

The Bazelon Center for Mental Health Law is a leading national legal-advocacy organization representing people with mental disabilities. Bazelon has a particularly long history of involvement in shaping the delivery of educational services to children with disabilities. The Center was counsel in *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), one of the two landmark class actions that challenged the exclusion of children with disabilities from school and whose consent decree became the basis for the IDEA's precursor, the Education for All Handicapped Children Act.

The Disability Rights Education and Defense Fund, Inc., (DREDF) is a national disability civil rights law and policy organization dedicated to securing equal citizenship for Americans with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts. A significant portion of DREDF's work is directed at securing and advancing the educational entitlements of children with disabilities, and DREDF is nationally recognized for its expertise in the interpretation of the Individuals with Disabilities Education Act.

SUMMARY OF ARGUMENT

When the school district is unable to obtain a consensus of the parent and school members of an IEP team on the appropriate program to serve a child with a disability, the school district should bear the burden of establishing the appropriateness of its proposal at a due process administrative hearing.

1. Placing the burden of proof on the school district in IDEA's administrative hearing would implement Congress' broad affirmative mandates that school districts locate, identify, evaluate, and provide an appropriate education to all children with disabilities.

In passing IDEA, Congress imposed a broad, affirmative mandate on school districts to provide a free appropriate public education to *all* children with disabilities. In so doing, Congress required that schools (1) on their own initiative, search out, identify, and evaluate all children with disabilities, including children in private schools; and (2) provide all children with disabilities with a free appropriate public education designed to meet their unique needs. Congress did not structure the program as a benefit that children or their families must apply for, and it went beyond a mere prohibition of discrimination in the provision of educational services to children with disabilities.

2. Placing the burden on the school district recognizes that in the unique circumstance of an IDEA administrative hearing, the school district stands in a better position to meet the burden than the parents.

During the IEP and administrative hearing processes, only the school district is fully aware of the rationale behind its proposal, and only the school district has full, unfettered access to all relevant information about a proposed placement. The school district typically employs the professional witnesses or other experts who have worked with or evaluated the child. The parents often proceed *pro se* and do not appreciate the import of the burden of proof or have any experience in the mechanisms for presenting evidence. These considerations take on added importance in IDEA administrative hearings, because there is usually no right to discovery by which the parents can obtain documents (other than the child's own file) or to depose school district employees.

For these reasons, placing the burden of proof on the parents risks denying a child with a disability the appropriate education IDEA requires. Placing the burden of proof on the school district creates no such risk; it simply promotes the Congressional goals of providing an education to all children with disabilities.

IDEA's procedural protections for parents do not "level the playing field," as the Fourth Circuit asserted, because they do not fundamentally alter the school district's superior position and resources. Moreover, IDEA's procedural protections and parent participation rights demonstrate Congress' concern for parents' roles. Placing the burden of proof on the school district would be consistent with this Congressional intent, while imposing little additional burden on a school district. Placing the burden on the parents, on the other hand, would risk inviting school districts to ignore or undermine parents' rights, while imposing significant costs on them and creating a substantial risk of denying children with disabilities an appropriate education.

ARGUMENT

In assigning the burden of proof in IDEA administrative hearings, the Fourth Circuit incorrectly applied a so-called "normal rule of allocating the burden to the party seeking relief," Petitioner's Appendix ("P.A.") 6, and declined to deviate from this supposed default rule. But the Fourth Circuit's heavy reliance on an arbitrary default rule has little legal support. As this Court has previously held, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, 'is

merely a question of policy and fairness based on experience in the different situations.'" *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (quoting 9 J. WIGMORE, EVIDENCE § 2486 (3d ed. 1940)). The Court has acknowledged that "looking for the burden of pleading is not a foolproof guide to the allocation of the burdens of proof. The latter burdens do not invariably follow the pleadings." *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.1 (2004) (quoting 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 (5th ed. 1999)). In addition, "[n]o 'single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." *Id.* (quoting 9 J. WIGMORE, EVIDENCE § 2486 (J. Chadbourn rev. ed. 1981)). "Among other considerations, allocations of burdens of production and persuasion may depend on which party . . . 'presumably has peculiar means of knowledge.'" *Id.* (citations omitted).

Moreover, because the "assignment of the burden of proof is a rule of *substantive law*," *Dir. v. Greenwich Collieries*, 512 U.S. 267, 271 (1994) (citation omitted) (emphasis added), ordinary principles of statutory interpretation require that the Court allocate the burden of proof in a manner that *supports*, rather than undermines, the statutory purpose. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984); *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (when interpreting an imprecise statute, courts should look to the statutory purpose).

I. PLACING THE BURDEN OF PROOF ON THE SCHOOL DISTRICT WOULD BEST SERVE CONGRESS' AFFIRMATIVE MANDATE THAT ALL CHILDREN WITH DISABILITIES RECEIVE A FREE APPROPRIATE PUBLIC EDUCATION.

Congress enacted the IDEA to "ensure" that "all" children with disabilities were provided a free appropriate public education. 20 U.S.C. § 1400(d)(1) (2005). To fulfill this purpose, Congress created a statutory obligation requiring states to provide a free appropriate education to all children with disabilities in exchange for receiving federal funds. 20 U.S.C. § 1412(a)(1); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982).[5]

Significantly, to ensure that the school district provided *all* children with disabilities an appropriate education, Congress did not leave it to parents to apply for services under the IDEA. Instead, Congress imposed a unique affirmative obligation on states and local school districts to identify, locate, and evaluate children, even those in private schools and prisons. 20 U.S.C. § 1412(a)(3); 20 U.S.C. § 1412(a)(10)(A)(ii); *see M.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996) ("a child's entitlement to special education should not depend upon the vigilance of the parents who may not be sufficiently sophisticated to comprehend the problem"); *Weyrick v. New Albany-Floyd County Consol. Sch. Corp.*, No. 4:03-cv-0095, 2004 U.S.

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[5] In *Rowley*, this Court traced the extensive background and history of the Act, noting Congress' desire to end discrimination and its dissatisfaction with progress under earlier enactments. *Id.*

Dist. LEXIS 26435 (S.D. Ind. Dec. 23, 2004) ("IDEA does not rely on parents to come forward to ask for help.").[6]

This decision made sense because parents may deny the existence of their children's learning difficulties or lack the sophistication of educational professionals to identify problems in the school context. School districts, however, employ professionals who are trained to recognize learning difficulties and who can act dispassionately in identifying these difficulties.

Congress dictated further that school districts were to provide a free appropriate education, to the maximum extent possible, in the "least restrictive environment," 20 U.S.C. § 1412(a)(5), that it be provided pursuant to an "individualized education program," 20 U.S.C. §§ 1412(a)(4), 1414(d), that it must be in place at the beginning each school year, 20 U.S.C. § 1414(d)(2)(A), and that the school district make available a "continuum of placement options." 34 C.F.R. § 300.551 (2004). Moreover, to ensure that local schools perform their jobs, Congress charged state agencies with ensuring compliance with the Act. 20 U.S.C. § 1412(a)(11). In short, as this Court noted in *Rowley*, "the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, ...

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[6] As Judge Luttig's dissent noted, this affirmative obligation on states to provide a free appropriate public education to all disabled children distinguishes IDEA from laws cited by the panel majority that prohibit various types of discrimination. P.A. 18 (Luttig, J., dissenting); *see also Olmstead v. L.C.*, 527 U.S. 581, 623 n.6 (1999) (Thomas, J., dissenting) ("IDEA is not an anti-discrimination law. It is a grant program that affirmatively requires States accepting federal funds to provide disabled children with a 'free appropriate public education.'"). The additional affirmative obligation to seek out children who require services further distinguishes IDEA from those statutes.

[and] imposes significant requirements to be followed in the discharge of that responsibility." 458 U.S. 176, 183 (1982).

These extraordinary requirements reflect Congress' strong judgment that providing children with disabilities an appropriate education would best serve society's interest. 20 U.S.C. § 1400(c)(1) (setting forth Congress' findings for enacting IDEA); *Rowley*, 458 U.S. at 201 n.23 ("providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds") (quoting 121 CONG. REC. 19492 (1975) (remarks of Sen. Williams)). Indeed, "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

As noted above, while some children with obvious disabilities are identified at the outset of a child's educational journey, many other children are identified only as they progress through school. Indeed, it is not uncommon for a child's teacher, and not the child's parents, to identify problems in the elementary school years, and seek to have the child evaluated. In all of these cases, if the child is determined to have a disability, IDEA requires the school district to provide that child a free appropriate public education. 20 U.S.C. §§ 1412(a)(1), 1412(a)(3)(A).

To achieve the objective of the statute, as reflected in Congress' broad affirmative command, the Court should place the burden of proof on the school district. If the Court places the burden of proof on the parents, the impact of an erroneous determination resulting from the application of the burden of proof is that a child with a disability will be denied the free appropriate public education that Congress required.

As explained further below, because parents are poorly positioned to bear the burden of proof, the risk of erroneous determinations would be unacceptably high. Accordingly, assigning the burden of proof to parents would undermine, rather than implement, Congress' statutory mandate. Because the burden of proof is a question of substantive law, *Greenwich Collieries*, 512 U.S. at 271, the Court should look, first and foremost, to adopt a burden of proof rule that implements, rather than undermines, the statutory purpose. *Bacto-Unidisk*, 394 U.S. at 799.

II. THE SCHOOL DISTRICT STANDS IN A BETTER POSITION TO BEAR THE BURDEN OF PROOF, AND PLACING THE BURDEN ON PARENTS RISKS DENYING CHILDREN WITH DISABILITIES AN APPROPRIATE EDUCATION.

As this Court has said, courts often assign the burden of proof "to conform with a party's superior access to the proof." *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977); *see also United States v. N.Y., N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); *United States v. Denver & R.G. R.R. Co.*, 191 U.S. 84, 92 (1903) ("[W]hen the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative.").

In the context of an IDEA administrative hearing, the school district stands in a better position to meet the burden of proof, and should bear the burden of proof in order to promote the statutory purpose of providing an appropriate education to all children with disabilities.

A. Many Parents Proceed *Pro Se* And Are Unfamiliar With The Implications Of Bearing The Burden Of Proof.

Parents often proceed *pro se*, without legal representation, at IDEA administrative hearings. The school district, however, is virtually always represented by counsel at such hearings. The school district's counsel will be familiar with the procedural and substantive requirements of IDEA, as well as the concepts of "burden of proof" and the mechanisms used for coming forward with evidence to meet that burden. For these reasons alone, the school district is far better situated than the *pro se* parent to bear the burden of proof.

In about one-half of the due process hearings that occurred between 1998 and 2002, in Illinois, for example, the school district was represented by counsel, while the parents had no such representation. Melanie Archer, Ph.D., *Access and Equity in the Due Process System: Attorney Representation and Hearing Outcomes in Illinois, 1997-2002*, *available at* http://www.dueprocessillinois.org/Access.pdf (last visited April 26, 2005). The lack of representation had a striking effect: parents with attorneys succeeded 50% of the time; parents without attorneys were successful merely 16% of the time. In amici's experience, the Illinois illustration is representative of the situation throughout the country. *See also* 150 CONG. REC. S5351 (May 12, 2004) (statement of Sen. Kennedy) (providing state data that shows school districts were much more likely than parents to bring counsel to hearings).

If a parent or guardian is unaware that he must proceed first and introduce witnesses or other evidence, he may proceed to a hearing without a prepared case, and be held to have failed to meet his burden before the factfinder ever hears from the school district. This could happen even if the school district's proposal was insufficient, even if the school district would not have been able to establish the appropriateness of its proposal, and even if the parent could have succeeded by simply asking questions of (i.e., cross-examining) the school's witness.

This is not just a hypothetical risk. As described above, in one recent Maryland administrative hearing decision, the administrative law judge found in favor of the Baltimore County Public Schools after the child's guardian – his sister – proceeded *pro se*. The hearing officer granted summary judgment even though Baltimore County produced no witnesses and no evidence, finding:

> It was clear that the Guardian, although well-intentioned, did not know how to go about presenting evidence to support her complaint . . . . As the trier of fact I am prohibited from assisting any party in the presentation of his/her case, or from extending procedural leeway in proving his/her case.[7]

The hearing officer concluded that the child's sister failed to present competent evidence, and ruled against her without hearing *any* evidence from the Baltimore County Public Schools. As this example illustrates, even if a child has a guardian advocating for her educational needs, the guardian's lack of experience with proffering evidence and setting forth a persuasive case is just one of the many examples that should convince this Court that the school district should bear the burden of proof.

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[7] *XXXX XXXX v. Baltimore City Pub. Sch.*, Order, OAH No.: MSDE-CITY-OT-200200192, Md. Office of Admin. Hearings (June 26, 2002), *available at http://www.msde.state.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf* (last visited April 27, 2005).

Sometimes the child with a disability does not even have a family members to act in his or her interest, but has only a volunteer "surrogate parent" to act on his behalf. Many children in foster care or who are homeless have disabilities and need special education, and, in fact, the newly revised IDEA contains additional provisions focused on ensuring that these children also receive special services.

Placing the burden of proof on the parents, as the Fourth Circuit did, serves only to magnify the need for parents to retain counsel for an administrative hearing. As has been well documented, not all parents and guardians have access to counsel or the resources to hire expert witnesses. [8] In any event, there is neither a statutory basis nor a policy reason to assign the burden of proof in a way that unnecessarily increases the need to inject lawyers into the administrative process.

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[8] *See, e.g.*, Rebecca W. Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 288 (Fall 1994); Kay H. Seven, *In the Matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?*, 9 Geo. J. on Poverty Law & Pol'y 193, 207 (Winter 2002); Damon Huss, *Balancing Acts: Dispute Resolution in U.S. and English Special Education Law*, 25 Loy. L.A. Int'l & Comp. L. Rev. 347, 361-62 (Spring 2003).

B. Parents Are Not Entitled Under IDEA To Pre-Hearing Discovery That Would Allow Them To Meet The Burden Of Proof.

While a plaintiff in a federal court action sometimes bears the burden of proving matters where the defendant has superior access to information, courts often justify this result on the ground that the plaintiffs can use pre-trial discovery procedures, such as those mechanisms found in the Fedeal Rules of Civil Procedure, to obtain the necessary information. 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 n.11 (5th ed. 1999). The IDEA, however, provides no right to such discovery mechanisms in an administrative hearing.

At most, IDEA guarantees parents access to their own child's written file, and to those select documents the school district intends to use to support its own case. IDEA provides no right for parents to issue document requests, serve requests for admissions, send interrogatories to the school, or depose school system personnel.[9] This presents numerous serious implications for parents attempting to protect their child's statutory right to a free appropriate public education.

1. Parents have no way of learning the school's contentions.

Parents have no way of obtaining complete information about the school district's offer – in particular, information that might contradict or undermine the appropriateness of the school district's offered IEP. The IEP process contemplates that the school district will explain to the parent its rationale for the IEP it is proposing. These explanations, however, are often cursory, self-serving, and jargon laden. Moreover, IDEA does not require that the school district present to the family information or evaluation data that contradicts its proffered IEP; and a school district, striving to get parental assent to its offer, may not candidly present the pros and cons of its proposals, particularly if it knows it will not bear the burden of proof at a hearing. Without discovery mechanisms, parents cannot be assured of accessing the information they need.[10]

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[9] Formal discovery does occur in some states pursuant to state-devised procedural rules. Even in those states, unrepresented families would have little chance of making effective use of discovery options.

2. Parents do not know, and have no right under IDEA to discover, details about a proposed placement.

Parents similarly have no right to learn the details of a school district's proposed placement, or the details of other placements within the "continuum" of placement options that IDEA requires school districts to offer. *See* 34 C.F.R. § 300.551 (2004) ("Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services."). Because the school district operates the program, it has complete and unfettered access to information about the program – and the ability to deny the parents access to that information. For example, parents may not even be able to observe the proposed placement, or to observe the child in the current classroom. *See, e.g., Hanson v. Smith,* 212 F. Supp. 2d 474, 487 (D. Md. 2002) (parents do

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[10] IDEA requires that the school district provide the reasons why it rejected other options, and the school district must include this explanation in the IEP. These explanations, however, usually contain a few conclusory phrases that are not calculated fully to inform the family of the range of options and reasons for rejections.

not have right to observe a placement). The Department of Education has agreed with this interpretation. It wrote:

> [N]either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement. The determination of who has access to classrooms may be addressed by State and/or local law.

Letter from Department of Education, Office of Special Education Programs to Ms. Shari Mamas, May 26, 2004, published at 42 Individuals with Disabilities Law Report 10, Vol. 42, Iss. 1 at 48 (2004).

Parents also have no right under IDEA to access information relevant to the appropriateness of a placement. For example, whether a placement is appropriate and whether it represents the "least restrictive environment" for the child, *see* 20 U.S.C. § 1412(a)(5) (2005), depends in part on the characteristics and needs of the other students in a particular program. But only the school district has access to data about the other children, which it can bring forward and use in a hearing if it believes the information is favorable to its position. If the information supports the parents' position, however, the parents have no right under IDEA to discovery mechanisms necessary to obtain it.

School districts also have access to data about the performance of other children in the proposed placement that they can use to support the appropriateness of the placement. Thus, for example, a school district has access to evidence of a particular program's success with other children with a similar profile. In one case, a school district introduced at the administrative hearing evidence of the proposed autism program's past success with other autistic children. *County Sch. Bd. of Henrico County v. Z.P.*, 399 F.3d 298, 308 (4th Cir. 2005); *cf. Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) (ALJ considered evidence about services provided to other students with disabilities). If the data would show the program has *not* been successful for similar children, parents have no right under IDEA to serve discovery requests or conduct depositions to obtain the data.

C. Parents Of Children With Disabilities Are Disproportionately Poorer And Significantly Less Educated.

The challenge for most parents grappling with IDEA is compounded by the fact that families of children with disabilities are poorer than the general population. A recent comprehensive study reported that in the year 2000, twenty-four percent of disabled students lived below the poverty line, compared to sixteen percent in the general population. Mary Wagner, et al., *The Children We Serve: The Demographic Characteristics Of Elementary And Middle School Students With Disabilities And Their Households (SEELS)* 28 (September 2002). Because of these financial limitations, many parents are simply unable to afford counsel, and may have difficulty paying to retain expert witnesses. Although the Act provides for attorneys' fee awards to successful parents, many parents are still not represented by counsel, nor can they find representation. 150 CONG. REC. S5351 (daily ed. May 12, 2004) (statement of Sen. Kennedy) (providing statistical data to demonstrate that parents rarely retain representation for hearings). Since assigning the burden of proof to parents increases the risk that the parents will not succeed, it also increases the risk that no fees will be awarded. As a result, it will be even less likely that parents will be represented, at the very same time that representation will become more important.

Parents of children with disabilities are also less well-educated than the population as a whole: only sixteen percent of mothers and twenty percent of fathers of children with disabilities had a college degree, compared to twenty-five percent of mothers and thirty-four percent of fathers in the general population. Wagner, at 23-24. While education levels are not determinative, parents with less education are sometimes less able to understand the requirements necessary to meet the burden of proof and to assemble a compelling affirmative case challenging the appropriateness of an IEP.

D. The School District Developed The Proposal And Should Already Have The Information Needed To Satisfy The Burden Of Proof.

Because the school district developed the proposal at issue and IDEA assigns primary responsibility for developing the educational program to the school district, the school district should have assembled the requisite evaluations and other relevant data and presented them at the IEP meeting. To the degree the school district prepared such materials for the IEP meeting as it should have done, there should be little additional burden for it to assemble those materials, present its rationale, and persuade an impartial factfinder that it has met IDEA's substantive requirements. To do so, the school district must merely show that the proposal would allow the child to make reasonable educational progress, or, as this Court has put it, "benefit from the instruction"; the school district need not prove that its proposal is the best alternative for the child. *Rowley,* 458 U.S. 176, 188-89 (1982).

E. The School District Employs Professionals Who Can Serve As Witnesses.

School districts employ numerous professionals who can serve as witnesses. This includes the child's teachers, as well as other professionals such as speech and occupational therapists and psychologists. In most cases, these individuals will have had prior experience and contact with the child, often for many years.

While the parent may hire independent experts, the school already has such personnel on its staff, can readily require their attendance at the hearing, and can require them to explain in their professional judgment, based on their experience with the particular child, why the school district believes its particular placement is appropriate.

As discussed above, however, the parents have no right to interview these witnesses, depose them, or otherwise prepare to cross-examine them. Even if school district employees *agree* with the parents, in practice, the parents have no way of learning this fact, unless the employees take the initiative to come forward and tell the parents that they disagree with their employer. These situations are understandably rare.

F. The Procedural Protections The Fourth Circuit Cited Do Not Warrant Placing The Burden Of Proof On Parents.

The Fourth Circuit misperceived the significance of the various procedural protections written into IDEA, which the majority suggested leveled the playing field and justified placing the burden of proof on parents. P.A. 9-12. To the contrary, these procedural mechanisms do not provide enough information to "level the playing field." Moreover, Congress' inclusion of these parent protections signals its intent to promote parent involvement and protect parents faced with a school district proposal with which they did not agree as members of the IEP team. Congress' creation of *procedural protections* for the parents in fact suggests that the separate *substantive law question* of the burden of proof should similarly be decided in a way that protects parents who disagree with officials from the school district, who "have a natural advantage." *Sch. Comm. of the Town of Burlington v. Dept. of Educ. of Massachusetts*, 471 U.S. 359, 368 (1985).

1. The procedural protections do not alter the fact that the school district stands in a better position to meet the burden of proof.

The protections Congress included recognize the "natural advantage" the school district has, *Burlington*, 471 U.S. at 368, but do not by any stretch put parents in a better position than school districts to meet the burden of proof.

a. For example, although the statute requires the school district to provide the parents with a copy of the child's written file, as the Fourth Circuit noted, P.A. 10, this right is in reality quite limited. The school need not provide other documentation the parent might need to determine whether a proposed placement is appropriate, the historical performance of the proposed program, and the characteristics of children in the proposed program, as discussed above.

b. Similarly, the court below suggested that Congress provided for "discovery" by requiring the parties to exchange witness lists and exhibits 5 days before the administrative hearing. P.A.. 11. As discussed above, however, these pre-hearing disclosures fall well short of "discovery" in the sense of federal procedural discovery rules, which permit parties to ferret out favorable evidence in the hands of the opposing party. Rather, these pre-hearing disclosure rules simply require the school district to disclose documents it believes support its case. Nothing in the disclosure provision requires the school district to provide documents adverse to its case or allows the parents to require the production of such documents. Thus, the limited pre-hearing disclosures that the IDEA requires fall well short of the type of discovery a parent might need to meet the burden of proof where most relevant evidence is in the school district's possession.

c. The Fourth Circuit majority also cited the fact that Congress authorized money for parent assistance centers. P.A. 10-11. These centers, however, are not mandatory, and a congressional authorization is nothing more than a recognition that the appropriations committees are authorized to appropriate money to fund such centers. In fact, many school districts lack any such center. In any event, in amici's experience, the services of these parent assistance programs that actually exist do not typically extend to assisting parents in preparing their cases for administrative hearings against the school district.

d. The Fourth Circuit misperceived the significance of the parents' inclusion as members of the IEP team. The Fourth Circuit majority failed to recognize the serious impediments to parents' participation in such meetings. The majority also ignored the fact that an administrative hearing takes place only because the school district did not obtain a consensus of the school district and parent members.

IEP meetings are inherently intimidating for parents worried about their children and faced by government officials, and the power balance during such meetings inherently favors the school district. As the Department of Education has recognized, "[i]n many situations, an IEP meeting can be a very intimidating experience for many parents, even if the [Local Education Agency] encourages their active participation." Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,582 (March 12, 1999). Therefore, "[a]lthough IDEA treats parents as equal participants on the IEP team, this parity position for parents is often illusory." Rebecca W. Goldman, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 280 (Fall 1994). In this context, placing the burden on the parents when the school district proceeds with a proposal the parents have not agreed to undermines Congress' goal of expanding parent participation – a goal that draws on parents' deep knowledge of their children's needs to ensure they are provided an appropriate education.

Thus, at these IEP meetings, the parents typically are vastly outnumbered by school district personnel. The school system is represented by the child's regular education teacher (if the child is in a regular classroom), the child's special education teacher, various personnel employed by the school district who have worked with or evaluated the child (e.g., speech therapists, psychologists, social workers, occupational therapists, and others), a school system administrator who is "knowledgeable about the availability of resources of the local educational agency," 20 U.S.C. § 1414(d)(1)(B), and potentially others. The school district employee runs the meeting and completes the various components of the IEP as the meeting progresses. School district professionals may present the results of specialized evaluations, using statistical information and educational jargon with which the parent is not necessarily familiar. Parents are usually alone. They are rarely accompanied by lawyers, which IDEA discourages at IEP meetings, 20

U.S.C. § 1415(i)(3)(d)(ii) (stating that "[a]ttorneys' fees may not be awarded relating to any meeting of the IEP Team"), and they do not have a similar coterie of experts.

One article for educators provided the following example, which describes the atmosphere of intimidation that a parent may feel upon entering the IEP meeting room:

> [The parent] noticed that the professional team members had already arrived at the room. They seated themselves along one of the long sides as well as at both short ends of the rectangular table. [The parent] took the lone seat in the middle of the remaining side.

Diane M. Dabkowski, *Encouraging Active Parent Participation in IEP Team Meetings*, 36 Teaching Exceptional Children 34, 35 (Jan/Feb 2004). This feeling – that parents are outnumbered and alone – is common among parents attending IEP meetings. *See, e.g.*, Pamela P. Garriott, et al., *Teachers as Parents, Parents as Children: What's Wrong with this Picture?*, Preventing School Failure, Fall 2000, at 41 (quoting parent saying, "[f]or many years I was grieving over my daughter's disability and overwhelmed by the number of people they had versus one lonely, sad, guilty, mom.").

Amici's experience, and published cases, reflect the many impediments to meaningful parent participation. For example, school districts often present parents with draft IEPs, and then sit and watch while the parents read and sign them. In one case, a school district scheduled a meeting at a time when the parent could not attend due to work or other obligations, and then proceed without the parents.[11] In some instances, school districts have simply refused to discuss a placement the parent suggested;[12] or have refused to review professional evaluations submitted by the parents.[13] Frequently, school district personnel assert – incorrectly – in IEP meetings that IDEA prohibits what the parents are requesting.[14] The problems and challenges are numerous, and the school district must make a conscious effort to involve parents and seek consensus. The parents' presence at IEP meetings falls well short of "leveling the playing field."

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[11] *Shapiro v. Paradise Valley Unified Sch. Dist.*, 317 F.3d 1072 (9th Cir. 2003).

[12] *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242 (D. Vt. 1996) (school district team members "told [the parent] that Maplewood school would not be discussed.").

[13] *Dibuo v. Bd. of Educ.*, 309 F.3d 184 (4th Cir. 2002) ("the School District members of Mark's IEP Team refused to consider the evaluations.")

[14] There is extensive literature discussing the barriers to parent participation:

> The studies indicate that educators tend to focus on a child's weaknesses and faults as a way of coercing parental compliance with the school personnel's recommendation. Others observe that school personnel do not allow parents to give constructive input on their child's needs or simply do not incorporate parents' input into an IEP recommendation. Parents report that school officials tend to blame them for their child's problems, particularly when the nature of the child's disability is undetermined. Several studies note the extensive use of educational and medical terminology that accompany IEP meetings, which often has the effect of excluding parents from the dialogue.

Stephen C. Shannon, *The Individuals with Disabilities Education Act: Determining "Appropriate Relief" in a Post-Gwinnett Era*, 85 Va. L. Rev. 853, 879 (August 1999).

2. Assigning the burden of proof to the school district implements Congress' objective in enacting procedural protections and promotes parent participation.

In recognizing the power differential between parents and the school district, Congress structured IDEA to contain some protections for parents that would represent a start to minimizing this disparity. Congress' failure to speak directly to the substantive law question of the burden of proof in an administrative hearing does not indicate, as the Fourth Circuit majority apparently felt, that the parents should bear the burden of proof. To the contrary, the statute's concern for parental involvement and protection, along with its mandate for a free appropriate education, require precisely the opposite result. This is because the Court should decide the substantive law question of the burden of proof in a manner that "produces a substantive effect that is compatible with the rest of the law." *United Sav. Assoc. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

The statute's inclusion of various procedural protections for parents reflects Congress' recognition that parents would be at a disadvantage in a dispute with the school district, *see Burlington*, 471 U.S. at 368, as well as Congress' belief that parents offer important insight into their child's needs and should therefore be members of the IEP team.

Assigning the burden of proof to the school district in those situations in which the district does not obtain a consensus of the school district and parent members of the IEP team[15] would align the substantive burden of proof

standard with the Act's procedural protections, with Congress's expressed desire to promote parental involvement, and with Congress' desire to ensure that children with disabilities receive an appropriate education.

If the school district is not required to justify its proposals at a hearing when it fails to achieve a consensus at the IEP meeting, it will have little incentive to treat the parents as equal participants in the IEP meeting. In fact, if the burden of proof is on the parents, the school district would have the opposite incentive: the less objective information the school district discloses at the IEP meeting and the less open it is in its discussion with the parents, the better its position if the matter ends up at a hearing. School districts would be encouraged to be *less* forthcoming at the IEP stage, since they would suffer little consequence from having failed to achieve consensus, and could simply wait to see if the parents are able to prepare their case. The ultimate impact is that the parent-school district partnership that Congress sought to ensure with the IEP process will be substantially undermined.

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[15] The Department of Education has explained that school districts are responsible for the IEP process, and for promoting the required services, (continued...)

but that "parents are considered equal partners with school personnel in making . . . decisions." This means that:

> [T]he IEP team *should work toward consensus*, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. It is not appropriate to make IEP decisions based on a majority 'vote.' If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing.

64 Fed. Reg. 12,473-74 (March 12, 1999).

At the same time, there is no harm to school districts from requiring them to bear the burden at the administrative hearing since the school district is expected to be able support and justify the proposals it makes in meetings with parents, who are equal members of the IEP team. If the school district has followed the dictates of the IDEA and followed IDEA's requirement to hold an IEP meeting at which parents are equal participants, the school district should *already* be prepared to present that very same information to and persuade a neutral fact-finder.

CONCLUSION

For the foregoing reasons, amici request that this Court reverse the decision of the Court of Appeals for the Fourth Circuit and remand this case for further proceedings below.

Respectfully submitted,

ANKUR J. GOEL	MCDERMOTT WILL &
Counsel of Record	EMERY LLP
M. MILLER BAKER	600 13th Street, N.W.
KARLA L. PALMER	Washington, D.C. 20005
ERIK C. BAPTIST	(202) 756-8000

Counsel for Amici Curiae

Dated April 29, 2005

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No. 04-698

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◆

BRIAN SCHAFFER, a minor by his parents and
next friends, JOCELYN and MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County
Public Schools, and the BOARD OF EDUCATION OF
MONTGOMERY COUNTY, MARYLAND,

Respondents.

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

◆

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND EIGHT OTHER STATES AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

◆

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

ERIC A. GREGORY
JOEL C. HOPPE
Associate State Solicitors
General

MAUREEN RILEY MATSEN
Deputy Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the
Commonwealth of Virginia

April 29, 2005

[Additional Counsel Listed On Inside Of Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RICHARD BLUMENTHAL
Attorney General
of Connecticut
55 Elm St.
Hartford, Connecticut 06106
(860) 808-5318

LISA MADIGAN
Attorney General
Office of the Illinois
Attorney General
100 West Randolph St.,
12th Floor
Chicago, Illinois 60601
(312) 814-3698

PHILL KLINE
Attorney General of Kansas
120 S.W. 10th Ave., 2nd Fl.,
Topeka, Kansas 66612-1597
(785) 296-2215

MIKE HATCH
Attorney General
of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, Minnesota 55155-1609
(651) 296-6196

BRIAN SANDOVAL
Attorney General
Office of the
Attorney General
Nevada Department
of Justice
100 North Carson St.
Carson City, Nevada 89701
(775) 684-1112

PATRICIA LYNCH
Attorney General
State of Rhode Island
150 South Main St.
Providence, Rhode Island
02903
(401) 274-4400

ROB MCKENNA
Attorney General
of Washington
1125 Washington St.
P.O. Box 40100
Olympia, Washington
98504-0100
(360) 753-6245

PEGGY A. LAUTENSCHLAGER
Wisconsin Attorney General
Wisconsin Department
of Justice
P.O. Box 7857
Madison, Wisconsin 53701
(608) 266-0332

QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450, when parents of a disabled child and a local school district reach an impasse over the child's Individualized Education Program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the administrative hearing, which side has the burden of proof – the parents or the school district?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Connecticut, Illinois, Kansas, Minnesota, Nevada, Rhode Island, Washington, Wisconsin ("States"), have voluntarily chosen to receive federal funds under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1450 ("IDEA"). Consistent with the IDEA, the States, through their local school districts – all of which are created by the State and which are ultimately responsible to the State[1] – provide a Free and Appropriate Public Education for every disabled child in the school district. *See* 20 U.S.C. § 1412. Because every disabled child has different needs, the school districts, in consultation with the disabled child's parents, must develop an Individualized Education Program ("IEP") for each child.[2] *See* 20 U.S.C. § 1412(a)(2). In most instances, the parents and the school district readily agree on the content of the IEP. However, on occasion, the parents and the school district do not agree. In those instances, either the parents or the school district may seek an administrative hearing.[3] *See* 20 U.S.C. § 1414(a)(1)(C)(ii). The IDEA is silent on the issue of which side bears the burden of proof in that hearing.[4] The Circuits are divided on the

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[1] *See Rose v. Council for Better Education*, 790 S.W.2d 186, 208 (Ky. 1989); *Opinion of the Justices*, 246 A.2d 90, 92 (Del. 1968); *Moore v. Board of Education*, 193 S.E. 732, 734 (N.C. 1937).

[2] IDEA expressly guarantees to the parents the right to participate in this process. *See* 20 U.S.C. §§ 1414(d)(1)(B)(i) and (f).

[3] The decision of an administrative hearing officer may be appealed to either a state court of competent jurisdiction or a federal district court. 20 U.S.C. § 1415(i)(2)(A).

[4] In the 3,000 or so administrative hearings held each year under the IDEA, the role played by the burden of proof is self-evident. *See* Government Accounting Office, *Report to the Ranking Minority Member, Comm. on Health, Education, Labor, and Pensions* 1 (Sept. 2003) (reporting 3,020 administrative hearings held in 2000). However, the

(Continued on following page)

question, and this Court has granted certiorari to resolve the conflict.[5] *See* 125 S. Ct. 1300 (2005).

By filing this Brief in Support of the Petitioners, the States urge this Court to declare that when there is an administrative hearing regarding the contents of an IEP, the school districts bear responsibility for their decisions and therefore should shoulder the burden of proof. Alternatively, if this Court concludes that the burden should always be on the party seeking to alter the status quo, then the States ask this Court to recognize explicitly the authority of the States to determine and direct that local school districts assume the burden of proof.[6] Recognition of the States' authority to reallocate the burden of proof in IDEA hearings would be consistent with cases recognizing the authority of the States to enhance the protections of the IDEA. *See Blackmon*, 198 F.3d at 659; *Burke County Board of Education v. Denton*, 895 F.2d 973, 982-83 (4th Cir. 1990); *Board of Education of East Windsor Reg'l School District v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986); *David D. v. Dartmouth School Comm.*, 775 F.2d 411, 418 (1st Cir. 1985).

In taking the position that the burden should be on the school districts or, alternatively, that the States may direct the school districts to assume the burden of proof, the States pursue three separate and distinct state interests.

1. First, the States have an interest in complying with their respective State Constitutions and with the IDEA.

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significance of the burden goes far beyond these hearings. More than 6.5 million students have IEPs in place. *Id.* Each IEP is the result of a statutorily mandated process in which parents have a right to participate as well as a right to appeal any decision by the school district not to accommodate their requests.

[5] Four Circuits – the Fourth, Fifth, Sixth, and Tenth – place the burden of proof on the parents. *See Weast v. Schaffer*, 377 F.3d 449, 456 (4th Cir. 2004), *cert. granted*, 125. S. Ct. 1300 (2005); *Doe v. Board of Education of Tullahoma City*, 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986). In contrast, six Circuits – the Second, Third, Seventh, Eighth, Ninth, and the District of Columbia – place the burden of proof on the school district. *See Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648, 658 (8th Cir. 1999); *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2nd Cir. 1998); *Clyde K. v. Puyallup School District No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); *Oberti v. Board of Education*, 995 F.2d 1204, 1207 (3rd Cir. 1993); *McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985). Indeed, only two Circuits – the First and Eleventh – have not addressed the issue. *But cf. T.B. ex rel. N.B. v. Warwick School Cmte.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (stating in dicta that the school district always bears the burden of proof). *Devine v. Indian River County School Board*, 249 F.3d 1289, 1292 (11th Cir. 2001) (Once an initial IEP is in place, the burden of proof is on the party that wishes to change the IEP.).

[6] Many of the States would be willing to take this step. For example, in 1977, shortly after the IDEA was adopted, the Minnesota State Board of Education promulgated two rules that placed the burden of proof on school districts in special education due process hearings. One rule required a local school district to give parents who request a due process hearing a notice that states that at the hearing the burden of proof is on the school district to show that the proposed action is justified because of the child's educational needs, current educational performance, or presenting handicapping condition. Another rule, establishing hearing procedures, stated that "[t]he school district(s) shall bear the burden of proof as to all facts and as to grounds for the proposed action." In 2003, the Minnesota Legislature incorporated the burden of proof provision in statute, *see Minnesota Statute* § 125A.091, subd. 16.

a. Although education is not a *federal* fundamental right, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973), every State Constitution has a provision mandating, at a minimum, that the State provide a system of free public schools.[7] While these state constitutional "education clauses" have significant textual differences, most, if not all, of the States have a state constitutional duty to provide a free quality education to all children – including those with disabilities – in the State.

In discharging this duty to provide a quality education to all children, the States typically make general policy, but delegate much of the responsibility to the local school districts. Charles J. Russo, *The Law of Public Education* 138 (5th ed. 2004). Yet, despite this delegation of authority over the day-to-day implementation of education policy, the State remains responsible for assuring that the state constitutional mandate is met. *Id.* at 141 ("Delegation aside, legislatures cannot avoid their constitutional

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[7] *See* Ala. Const. art. 14, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. IX, § 1; Ga. Const. art. VIII, § VII, para. 1; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 3; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. VIII, § 1; Me. Const. art. 8, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5; Mich. Const. art. VIII, § 2; Minn. Const. art. XIII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. 9, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 1; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VII, § 1; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S.C. Const. art. XI, § 3; S.D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 68; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W.Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.

responsibilities by act of delegation to local authorities."). Indeed, when local school districts fail in their responsibilities under state law, the States often are obligated to intervene. *See Butt v. California*, 842 P.2d 1240, 1256 (Cal. 1992); *In re Board of Education of Trenton*, 431 A.2d 808, 810 (N.J. 1981).

b. Similarly, the IDEA imposes certain duties on the States. *See Board of Education v. Rowley*, 458 U.S. 176, 183 (1982) ("[A]lthough the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility."). *See also Id.* at 189 ("[T]he Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an 'inadequate education.'"); *Id.* at 189. The statute "evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.") *Id.* (emphasis original). Moreover, if a local school district fails to fulfill its obligations under the IDEA, the State itself may be obligated to provide the required services. *See Doe ex rel. Gonzales v. Maher*, 793 F.2d 1470, 1492 (9th Cir. 1986), *aff'd by an equally divided court sub nom. Honig v. Doe*, 484 U.S. 305 (1988). Because the State is responsible to the National Government for compliance with the IDEA, it has an interest in making sure the local school districts are accountable for their IEP decisions.

c. Requiring school districts to explain why their proposed IEP is appropriate is one way to address the States' concern for local IDEA compliance. When parents and educators disagree about the appropriate course of instruction for a child, the educators ought to have to explain to the State – the party ultimately responsible – why the educators' proposed IEP complies with the IDEA. The requirement that school district officials establish the appropriateness of their recommendation is not only proper in the IDEA context, it is sound public policy that promotes government accountability to its citizens.[8] School districts are better equipped to explain and justify their decisions. In order to prevail, the school districts need only explain why their proposed IEP meets the standards of the IDEA. Such an explanation promotes government accountability. This expectation will promote the careful consideration by school districts in the IEP process, not just of their own expert point of view, but of the information and opinions of parents. In other words, placing the burden of proof on the school districts in IDEA hearings will provide the States greater assurance that their obligations under both the State Constitution and the IDEA are being fully met.

2. Second, the States have an interest in providing disabled children the opportunity to learn and to minimize the limitations that result from their disabilities.[9] In fact, many States prohibited disability discrimination by nongovernmental actors before the National Government did so.[10] *See Garrett*, 531 U.S. at 368 n.5. However, because many States once had policies excluding disabled children from the public school, Congress was motivated to pass the IDEA. *See Rowley*, 458 U.S. at 179. While the IDEA has dramatically transformed education for disabled children, Perry A. Zirkel, *The Over-Legalization of Special Education*, 195 Educ. L. Rptr. 35, 35-36 (2005), the process for resolving disputes between parents and school districts continues to present challenges. *See Id.* at 36-38 (discussing current problems with the dispute resolution process and suggesting solutions that would reduce the costs of litigation). One way to continue this transformation of education for disabled children is to require school districts to bear the burden of proof in IDEA administrative hearings. A challenge to the local school district's recommendation should provide parents a meaningful opportunity to be heard, not a quixotic exercise in judicial deference to government decision-making. The availability of a meaningful challenge ensures that the party with the knowledge, the expertise, and the resources – the school

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[8] Indeed, when the government makes a decision that results in the deprivation of a constitutionally protected property interest, the Constitution requires that the government explain and justify its decision. *See Matthews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565, 579-80 (1975).

[9] This position is entirely consistent with the position of those States that assert that they should be immune from damages claims for violations of the civil rights statutes protecting disabled individuals. *See Tennessee v. Lane*, 124 S. Ct. 1978 (2004); *Medical Bd. of California v. Hason*, *cert. voluntarily dismissed*, 538 U.S. 958 (2003); *Board of Trus. of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001). *See also*

(Continued on following page)

Petition for Certiorari, *United States v. Georgia*, (U.S. March 9, 2005) (No. 04-1203); Petition for Certiorari, *Goodman v. Georgia*, (U.S. March 9, 2005) (No. 04-1236); Petition for Certiorari, *Columbia River Corr. Inst. v. Phiffer*, (U.S. Jan. 11, 2005) (No. 04-947) (all seeking review of the issue of whether sovereign immunity is abrogated for claims under Title II of the Americans with Disabilities Act in the prison context). Disability discrimination has no place in our society. However, that does not mean that those States' Treasuries should be subjected to damages claims.

[10] Indeed, Virginia passed the Virginians with Disabilities Act, *Virginia Code* § 51.5-1, more than five years before Congress passed the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12189.

district – employ these tools in a demonstrable way in the development and justification of an IEP. Ultimately, such a step will improve the quality of decision-making.

3. Third, the States have an interest in making sure parents are able to be actively involved and effective in the decisions concerning the education of their children. Indeed, this Court has recognized a constitutional right of parents to direct the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as enduring American tradition."). In an effort to equip parents to better exercise their constitutional rights, the States have adopted measures such as accountability testing, *see Virginia Code* § 22.1-253.13, school choice programs, *see Zelman v. Simmons-Harris*, 536 U.S. 639, 680 (2002) (Thomas, J., concurring), and charter schools, free from bureaucratic regulations. *See In re Grant of Charter School Application*, 753 A.2d 687, 689 (N.J. 2000); *Board of Education v. Booth*, 984 P.2d 639, 642-43 (Colo. 1999); *Council of Organizations and Others for Education About Parochiaid, Inc. v. Engler*, 566 N.W.2d 208, 213 (Mich. 1997). These efforts enable parents to make effective decisions about the education of their children. Assigning the burden of proof to the school system in IDEA administrative hearings is a similar effort on behalf of the parents of disabled children.

The judgment of parents who have good faith disagreements with the local school district over the content of *their* child's IEP should not be secondary to the judgment of

the school district. Forcing parents to bear the burden of proof is to treat the school district's judgment as superior to that of the parents. Parents are already at a disadvantage vis-à-vis the school when disputes arise under IDEA because parents generally lack specialized training and because their views are often treated as "inherently suspect" due to their attachment to the child. *See* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166, 187-94 (1991). The parents of disabled children should not be at a disadvantage or be overwhelmed. Moreover, because "the school district is also in a far better position to demonstrate that it has fulfilled this obligation than the disabled student's parents are in to show that the school district has failed to do so," *Weast*, 377 F.3d at 457 (Luttig, J., dissenting), parents bearing the burden of proof are put at exactly such a disadvantage. Given that an IEP can transform a child's life, if the school district wishes to implement an IEP over the parents' objections, then it is entirely reasonable to ask the school district to provide the evidence necessary to support its decision.

SUMMARY OF ARGUMENT

The States' argument in favor of the Petitioners is straightforward

1. Initially, the school district should bear the burden of demonstrating that its proposed IEP complies with the IDEA. This is so for two reasons. First, requiring the school district to bear the burden of demonstrating that its proposed IEP complies with the IDEA promotes governmental accountability. Second, requiring the school district to bear the burden of demonstrating that its proposed IEP complies with the IDEA promotes fundamental fairness.

2. Alternatively, if this Court concludes that the burden of proof should be allocated to the party challenging the IEP – almost inevitably the parents – then this Court should expressly recognize authority of the States to determine that their local school districts should bear the burden of proof and, by statute or regulation, direct them to do so. Such authority must be recognized for two reasons. First, the States have plenary power to define the powers and duties of local school districts. Second, recognizing such authority is consistent with constitutional principles of federalism.

ARGUMENT

I. THE SCHOOL DISTRICT SHOULD BEAR THE BURDEN OF DEMONSTRATING THAT ITS PROPOSED IEP COMPLIES WITH THE IDEA.

The IDEA is "an ambitious federal effort to promote the education of handicapped children" that was prompted by "Congress' perception that a majority of handicapped children . . . were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Rowley*, 458 U.S. at 179 (brackets in original) (internal quotation marks omitted). The law expresses "an abiding concern for the welfare of handicapped children and their parents." *Lascari v. Board of Education*, 560 A.2d 1180, 1188 (N.J. 1989). Congress sought to promote the education of children with disabilities by requiring the *States*, through

their local school districts, to provide every disabled child with an educational program that is reasonably responsive to that child's disability. *Rowley*, 458 U.S. at 188-89. In other words, the IDEA imposes an affirmative obligation on the States to provide a "Free and Appropriate Public Education" to disabled children.[11]

Furthermore, by requiring that disputes between parents and school districts be resolved through "due process hearings," 20 U.S.C. § 1415(f), the IDEA itself tells courts where to look to decide procedural issues like the burden of proof. Under this Court's due process jurisprudence, when there is a dispute between the government and a citizen, and where "the 'individual interests at stake . . . are both *particularly important* and *more substantial than mere loss of money*,'" the burden of proof must be "on the State." *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (other internal quotation marks and citations omitted) (emphasis added).

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[11] Additionally, it may be that the existence of an affirmative obligation on the government to act distinguishes the IDEA from most other civil rights laws. To explain, laws such as Title VI, 42 U.S.C. § 2000d, and Title IX, 20 U.S.C. §§ 1681-1688, require that government *refrain from acting*. Government violates the Title VI and Title IX only when it *actually acts* – when the government's action constitutes intentional discrimination. *See Jackson v. Birmingham Board of Education*, 125 S. Ct. 1497 (2005) (Title IX); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (Title VI). The underlying presumption is that the government will *not* do that which is prohibited. In contrast, the IDEA requires the government to *act affirmatively* to provide an education to the disabled child. Government violates the IDEA when it *fails to act* – when the proposed IEP is inadequate to provide a "Free and Appropriate Public Education." The underlying assumption is that the government must do that which is required.

A. Requiring the School District To Bear the Burden of Demonstrating That Its Proposed IEP Complies With the IDEA Promotes Governmental Accountability.

The fact that the IDEA imposes an affirmative obligation on the government suggests a greater need for government accountability. In other words, the government must demonstrate that it has done what it is obligated to do by statute. "Requiring parents to prove . . . that the school has failed to comply with the Act would undermine the Act's express purpose 'to assure that the rights of children with disabilities and their parents are protected,' and would diminish the effect of the provision that enables parents and guardians to obtain judicial enforcement of the Act's substantive and procedural requirements." *Oberti*, 995 F.2d at 1219 (citations omitted). Indeed, in those contexts where the IDEA has established a presumption in favor of a particular service, such as the presumption in favor of mainstreaming, 20 U.S.C. § 1422(5)(B), placing the burden on the parents would actually "turn the statute on its head." *Oberti*, 995 F.2d at 1219. Rather, the school district should demonstrate that its proposed IEP meets the standard of IDEA.

B. Requiring the School District To Bear the Burden of Demonstrating That Its Proposed IEP Complies With the IDEA Promotes Fundamental Fairness.

To the extent that the interests of fundamental fairness are relevant to the allocation of the burden of proof, *see Keyes v. School District No. 1*, 413 U.S. 189, 209 (1973), the burden should be assigned to the party that controls the essential evidence and/or possesses superior knowledge of the facts. *See NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176-77 (D.C. Cir. 1965) (holding that the burden of proof should be allocated to the party who controls the relevant information needed to decide the dispute); *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947) (stating the question of fairness affects the assignment of the burden of proof).

In an IDEA administrative hearing, the party that controls the essential evidence or possesses superior knowledge of the facts is the school district. As the Third Circuit observed:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

Oberti, 995 F.2d at 1219. Moreover, as Judge Luttig observed:

> For the vast majority of parents whose children require the benefits and protections provided in the IDEA, the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering. By the same token, most of these parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children.

Weast, 377 F.3d at 458-59 (Luttig, J., dissenting). In short, when parents choose to litigate with a school district over the appropriate course of an IEP for *their* child, they face an opponent that has more information, more expertise, more experience, and, in the vast majority of cases, more resources. In order to correct this imbalance, it is necessary to place the burden on the school district. *See Lascari*, 560 A.2d at 1188 (noting that placing the burden of proof on school is "consistent with the proposition that the burdens of persuasion and of production should be placed on the party better able to meet those burdens.").

II. THE STATES HAVE THE AUTHORITY TO DIRECT THEIR LOCAL SCHOOL DISTRICTS TO ASSUME THE BURDEN OF PROOF.

For the reasons explained above, this Court should hold that the burden of proof in an IDEA administrative hearing is always on the school district. However, this Court may choose to adopt the minority position and hold that the burden of proof is always on the party seeking to change the IEP. As a practical matter, this would mean that the burden is almost inevitably on the parents of disabled children.

If this Court chooses the second path, then the States request this Court to also explicitly recognize that the States have the authority to direct that their local school districts bear the burden of proof in an IDEA administrative hearing. In other words, the States desire an explicit acknowledgement that a State, as a matter of policy, may decide that school districts should bear the burden and direct its school districts to abide by the State's choice.

A. The States Have Plenary Power Over the School Districts.

First, allowing the States to direct that the school districts must bear the burden of proof recognizes the constitutional reality that local school districts "have only such power and authority they are granted by their state legislatures." Russo, *supra*, at 138. *See also National Education Ass'n v. Unified School District No. 259*, 674 P.2d 478, 482 (Kan. 1983); *Academy of Charter Schools v. Adams County School District No. 12*, 32 P.3d 456, 469 (Colo. App. 2001). Moreover, in some States, local school districts are considered an "arm of the State." *See, e.g.*, *Ambus v. Granite Board of Education*, 995 F.2d 994, 997 (10th Cir. 1993) (*en banc*) (Utah School Districts). In these States, the decision to direct a local school district to assume the burden of proof is no different from directing a state agency or institution of higher education to take on a particular role. Because all States have plenary power to create school districts and to define their powers, and duties,[12] there is no federal limitation that precludes an exercise of the States' authority to require that school districts accept responsibility for justifying their IEP decisions.

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[12] Of course, the States may limit, as a matter of state constitutional law, their own powers with respect to local school districts that they have created. *See, e.g.*, Colo. Const. art. IX, § 15 (Each school district controls instruction in its schools.).

B. Allowing the States To Direct Their School Districts To Assume the Burden Is Consistent With the Constitutional Value of Federalism.

Permitting the States to shift the burden of proof from the parents to the school districts also vindicates the constitutional principles of federalism. In our system of dual sovereignty, the States serve as laboratories for policy experimentation. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., joined by O'Connor, J. concurring). *See also New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). In fact, the IDEA has an implicit federalism component. If a State passes legislation that confers substantive rights which are greater than those conferred by the IDEA, then those additional substantive rights may be enforced through the IDEA administrative process. *Blackmon*, 198 F.3d at 658-59; *Denton*, 895 F.2d at 982-83; *Diamond*, 808 F.2d at 992; *David D.*, 775 F.2d at 417-18. In other words, the IDEA establishes a floor, but the States have the authority to build a platform that is above the federal floor.[13] *See Converse County School District No. 2. v. Pratt*, 993 F. Supp. 848, 855 (D. Wyo. 1997); *Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (both holding that the IDEA preempts state law and regulations only to the extent that the state standards confer less benefits than the IDEA). By placing the burden of proof on the school districts, States simply would be choosing, as a matter of policy, to improve the position of parents just as it may enact additional substantive rights for disabled children. If the States are allowed to confer additional *substantive* benefits for children, then surely the States are allowed to confer additional *procedural* benefits on their parents.

◆

CONCLUSION

For the reasons stated above, in the Petitioners' Brief, and in the Briefs of the other Amici supporting the Petitioners, the judgment of the United States Court of Appeals for the Fourth Circuit should be **REVERSED**.

Respectfully submitted,

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

ERIC A. GREGORY
JOEL C. HOPPE
Associate State Solicitors
General

MAUREEN RILEY MATSEN
Deputy Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436
(804) 786-1991 (facsimile)

Counsel for the
Commonwealth of
Virginia

[additional counsel listed
on inside of cover]

April 29, 2005

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[13] In this respect, the relationship between the IDEA and substantive State law is like the relationship between the United States Constitution and the State Constitutions. *See generally* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976).

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In The
Supreme Court of the United States

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BRIAN SCHAFFER, A MINOR BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, *ET AL.*,

Petitioners,

v.

JERRY WEAST, SUPERINTENDENT OF MONTGOMERY COUNTY PUBLIC SCHOOLS, *ET AL.*

◆

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

◆

BRIEF FOR THE ARC OF THE UNITED STATES, AUTISM SOCIETY OF AMERICA, EPILEPSY FOUNDATION, NAMI, UNITED CEREBRAL PALSY, AND THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

◆

DREW S. DAYS, III
Counsel of Record
SETH M. GALANTER
LINDA A. ARNSBARGER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

Counsel for Amici Curiae

APRIL 29, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICI CURIAE*

Amici curiae advocate on behalf of children with disabilities, including children with disabilities coming from poor or homeless families, to ensure that they receive the free appropriate public education they are guaranteed under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*[1]

The Arc of the United States is a national organization of and for people with mental retardation and related developmental disabilities and their families. The Arc was founded in 1950 by a small group of parents and other concerned individuals with the primary purpose of procuring services for children who were denied an education by public schools. The Arc today is a grassroots organization with 140,000 members who are affiliated through approximately 1,000 state and local chapters across the nation. The Arc works to ensure that the estimated 7.2 million Americans with mental retardation and related developmental disabilities have the services and supports they need to grow, develop, and live in communities across the nation. These services include early intervention, health care, a free appropriate public education, and supports for their families.

The *Autism Society of America* (ASA) is a national organization dedicated to increasing public awareness about autism and the day-to-day issues faced by individuals with autism and their families, and advocating for programs and services for the autism community. ASA began 40 years ago with the vision of one father, Bernard Rimland, Ph.D., and the help of a handful of parents of autistic children. One of the small group was Ruth Sullivan, who was a driving force behind the enactment of the IDEA's predecessor in 1975. ASA currently consists of more than 50,000 members and supporters connected through a network of 200 chapters nationwide. Over the last four decades, ASA has been responsible, in part or in whole, for the introduction of many pieces of major legislation involving the education of children with disabilities.

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The *Epilepsy Foundation* is a nonprofit corporation founded in 1968 to advance the interests of 2.5 million Americans with epilepsy and seizure disorders. With its affiliates throughout the nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizure disorders. Because the term "epilepsy" evokes stereotyped images and fears in others that affect persons with this medical condition in all aspects of life, the Epilepsy Foundation has worked to dispel the stigma associated with seizures, and has supported the development of laws, including the IDEA, that protect individuals from discrimination based on these stereotypes and fears.

NAMI, with more than 220,000 members and 1,200 state and local affiliate organizations, is the Nation's voice on mental illness and the leading grassroots advocacy organization dedicated to improving the lives of children, adolescents, and adults living with mental illnesses. NAMI members include mental health consumers, family members, professionals, and other advocates. NAMI works across our nation to ensure that children and adults with mental illnesses receive appropriate treatment and services, including educational services under the IDEA, that allow them ultimately to lead independent and productive lives.

United Cerebral Palsy (UCP) is one of the largest national charitable organizations focusing on people with disabilities and their families. Since its inception more than fifty years ago, UCP has actively participated in formulating policy to ensure the rights and full inclusion of people with all disabilities. Given that such inclusion for children and youth with disabilities largely depends on their individual access to a free appropriate public education, the effort to ensure that this access is consistently upheld is one of UCP's highest priorities.

The *National Law Center on Homelessness & Poverty* (NLCHP) serves as the legal arm of the nationwide movement to prevent and end homelessness. NLCHP, established in 1989, seeks to protect the education rights of homeless children by enforcing the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 *et seq.*, a federal law that provides a wide array of educational rights to children and youth in homeless situations. NLCHP worked to ensure that, when the IDEA was reauthorized in 2004, provisions were added to address the special needs of children with disabilities who also experience homelessness.

SUMMARY OF ARGUMENT

A. In determining the appropriate party to bear the burden of proof where the statute does not expressly so provide, this Court assesses "the relative position of the parties" as one critical factor, and places the burden of proof on the party that "occupie[s] the position of advantage." *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.). In determining where the burden of proof should lie in due process hearings under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, this Court must consider the entire spectrum of parents of children with disabilities and the resources they are able to muster to participate in the procedures established by the IDEA, not simply the facts of this case.

Although there is great variation, parents of children with disabilities are more likely to have characteristics that make it more difficult to navigate successfully the often adversarial procedures established by the IDEA. Parents of children with disabilities tend to be less educated than parents of students in the general population. A substantial portion of children with disabilities come from economic and social circumstances – including, *in extremis*, poverty and homelessness – more adverse than other children and that are likely to limit the parents' opportunity to participate fully in the process to develop an Individualized Education Program (IEP) for their child. Some children with disabilities must rely on foster parents or other surrogates, instead of their parents, to advocate on their behalf.

School districts hold significant advantages over parents in developing an IEP and at any ensuing due process hearings. Many parents enter the process of developing an IEP ignorant of their rights and intimidated by the process. Further, school districts generally have information not available to parents that is relevant in developing an IEP. Information regarding the likelihood that a school district's proposed IEP has worked (or not worked) in the past for other children, for example, is uniquely available to that school district.

The burden of proof dictates the structure of the proceeding, determining who must present their evidence first. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). Inexperienced parents, often unrepresented by counsel, are at a substantial disadvantage at due process hearings if they have to present their "case" first, not understanding what is expected of them and lacking the opportunity to model their presentation on that of the school district's representative. By contrast, the school district is normally represented by an attorney, a repeat player familiar with the formal and informal rules surrounding such proceedings. School districts can also rely on existing school employees (such as counselors, social workers, and nurses) to testify at the hearings as experts in support of the proposed IEP. For many children who are entitled under the IDEA to a free appropriate public education, the required ardor of the parents is necessarily outweighed by a lack of resources necessary to engage school districts.

Placing the burden of proof on school districts will provide a needed counterweight for these families and thus ensure that the burden of proof is on the party that occupies the position of advantage.

B. Other important factors in determining which party should bear the burden of proof are "the policies behind the statute," along with "evidentiary probabilities" of whether the challenged action was incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring in judgment). Moreover, when constitutional rights are involved, the burden of proof must be calibrated to ensure that imperfect information does not result in constitutional violations. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). These factors also support placing the burden of proof on school districts, many of which were responsible for subjecting millions of children with disabilities to blatant and unconstitutional discrimination.

In enacting the IDEA's predecessor in 1975, Congress found that millions of children with disabilities were either excluded from or otherwise denied an appropriate public education. In light of federal courts declaring such practices unconstitutional, Congress enacted the IDEA "in order to assure equal protection of the law." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975). When Congress reauthorized the IDEA in 1997 and again in 2004, it retained this finding, *see* 20 U.S.C. § 1400(c)(6), and the legislative history is replete with statements that the IDEA was intended to vindicate the constitutional rights of children with disabilities. This Court has reached the same conclusion. *See Smith v. Robinson*, 468 U.S. 992, 1013 (1984). In enacting the Americans with Disabilities Act of 1990, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education," 42 U.S.C. § 12101(a)(3), a finding supported by that Act's legislative history, case law, and subsequent reports by independent governmental bodies.

The undisputed fact that millions of children with disabilities were unjustifiably and unconstitutionally denied public educations for decades preceding the enactment of the IDEA warrants placing the burden of proof on school districts to show that they are currently in compliance with their constitutionally- and statutorily-mandated obligations. This was the rule adopted by this Court in cases involving racial desegregation at the time Congress first enacted the IDEA in 1975. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209 (1973). If Congress had intended to deviate from such well-known precedent in enacting the IDEA and adopt a rule favoring school districts, it could have easily done so. To the contrary, Congress demonstrated special solicitude for children with disabilities in the IDEA by creating a statutory scheme imposing affirmative obligations on school districts. Because the IDEA was intended to constitute a remedial measure to redress a pattern of discrimination, its provisions should be read to place the burden of proof on school districts, as this Court has done under analogous statutes.

C. Placing the burden of proof on school districts will aid petitioners and other families in due process hearings by structuring the production of evidence in a manner more favorable to the children and granting the families the benefit of the doubt when the evidence is in equipoise.

Just as importantly, placing the burden of proof at the due process hearings on school districts will alter a school district's conduct as it drafts every IEP and meets with all parents. If a school district is aware that it will be required to show that its proposed education plan for the child meets the substantive requirements of the IDEA in any subsequent due process hearing, it will have a stronger incentive to work with the parent to reach the correct result in initially developing the IEP.

This procedural incentive is necessary to combat the strong competing incentives faced by school districts on the other side. Pressured by short-term budgetary concerns, school officials are often not willing to provide the appropriate special education and related services required by the IDEA. Holding that the burden of proof falls on school districts, however, should not change the spending patterns by most school districts because most of them have been bearing the burden of proof for the past 30 years. Any increase in costs to school districts due to the burden of proof will be the result of school districts coming into compliance with their existing substantive obligations, a result about which they can hardly be heard to complain.

Society as a whole, in addition to the child with the disability, benefits if school districts comply with the IDEA because money spent today on special education will permit children with disabilities to become productive members of society instead of individuals reliant on government services. For certain disabilities, such as autism, if the proper special education is not provided at an early age, the window of opportunity for treating the disability may pass completely. Given the high individual and societal costs involved in denying a child – even temporarily – the appropriate public education to which he or she is entitled under the IDEA, the burden of proof properly is placed on school districts to avoid the risk of error and encourage compliance with the law.

ARGUMENT

PLACING THE BURDEN OF PROOF ON A SCHOOL DISTRICT AT A DUE PROCESS HEARING TO SHOW THAT IT IS PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION TO A CHILD WITH A DISABILITY IS WARRANTED BY SCHOOL DISTRICTS' ADVANTAGES OVER PARENTS AND THE HISTORY OF DISCRIMINATION AGAINST CHILDREN WITH DISABILITIES

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, does not expressly provide which party should bear the burden to prove in an "impartial due process hearing" that a student with a disability is receiving the free appropriate public education guaranteed by the statute. As respondents acknowledge (Br. in Opp. 18-20), however, virtually all of the States that have propounded their own statutes or regulations that expressly address the issue (some contemporaneous with the enactment of the IDEA's predecessor in 1975) have placed the burden of proof on school districts.

At the same time, a majority of the appellate courts to address this issue over the past 30 years have concluded that federal law compels the placement of the burden of proof on school districts. *See* Pet. Br. 18. It is also the position espoused by the United States Department of Education, as reflected in an *amicus* brief filed at an earlier stage of this very litigation. *See* Brief for United States as *Amicus Curiae*, *Schaffer v. Vance*, No. 00-1471 (4th Cir.).

This Court's cases have looked to a variety of factors in placing the burden of proof when the statute is silent on the matter. *Amici* focus in this brief on two factors that are critical to the proper apportionment of the burden under the IDEA. First, placing the burden of proof on school districts mitigates the structural advantages that school districts have in their interactions with most parents, particularly parents who lack the economic, social, and educational resources that are necessary to understand the complexities of their child's individualized education program and to participate in an adversarial administrative proceeding. Second, placing the burden of proof on school districts furthers Congress's intent to redress the unconstitutional discrimination, exclusion, and miseducation of children with disabilities.

Neither the court of appeals below nor respondents' brief in opposition to *certiorari* gives a reason to upend the well-established practice of placing the burden of proof on school districts. They offer no evidence, nor are we aware of any, that this practice is infeasible or has led to unjust results. To the contrary, placing the burden of proof on the parents would lead to fewer children with disabilities receiving the appropriate education to which they are entitled under the IDEA because the risk of error would be borne by the children, and because school districts would have one less incentive for complying with the IDEA.

A. Placing The Burden Of Proof On School Districts Lessens Structural Advantages That School Districts Have Over The Vast Majority Of Parents

In determining the appropriate party to bear the burden of proof, this Court assesses "the relative position of the parties," and places the burden of proof on the party that "occupie[s] the position of advantage." *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914) (Holmes, J.). The relationship between school districts and parents of children with disabilities affords school districts multiple advantages at due process hearings and at earlier stages of the process. "It is parents who continue to be at a disadvantage when it comes to the IDEA." 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Sen. Kennedy).

1. Parents of children with disabilities vary significantly in the resources they can muster to navigate successfully the often adversarial procedures established by the IDEA

Parental participation in the IDEA process is critical to the development of an appropriate education for a child with a disability. As this Court explained in *Board of Education v. Rowley*, 458 U.S. 176 (1982), Congress recognized that the diversity of children with disabilities confounds one-size-fits-all approaches to providing the special education and related services necessary to ensure each child receives an appropriate education. *Id.* at 202. Thus, Congress adopted a series of procedural mechanisms to encourage school districts and parents, working with experts, to develop jointly an Individualized Education Program (IEP) that grants "access to specialized instruction and related services which are individually designed to provide educational benefit" to each child with a disability. *Id.* at 201. Parents are an essential component of that process. "Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational program." *Id.* at 208 (citation omitted).

While most "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act," *id.* at 209, school districts hold certain structural advantages that make it difficult for many parents to engage in the "full participation" that Congress recognized would be necessary to reach the correct individualized program for each child, *see id.* at 206. As Judge Luttig noted below in dissent, the Fourth Circuit panel's placement of the burden of proof on the parents may have been influenced by the resources and expertise evidenced by the committed parents in this case that may have made it seem as if neither party held a distinct advantage. Pet. App. 20. But the burden of proof for all due process hearings cannot be determined based on the characteristics of these particular parents.

Instead, in determining where the burden of proof should lie, this Court must consider the entire spectrum of parents of children with disabilities and the resources they are able to muster to participate in the procedures established by the IDEA. Although there is great variation, parents of children with disabilities are more likely to have characteristics that make it more difficult to navigate successfully the often adversarial procedures established by the IDEA. Many of the problems discussed below are faced by significant numbers of parents, in varying degrees, from all walks of life.

a. Parents of children with disabilities tend to be less educated than parents of students in the general population. They are 50 percent more likely to have only a high school education or less, and almost twice as likely to have not completed high school at all. Their college graduation rate is two-thirds that of other parents. *See* Office of Special Education Programs, U.S. Dep't of Educ., *Special Education Elementary Longitudinal Study (SEELS): The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and Their Households* 23-24 (Sept. 2002).

b. A substantial portion of children with disabilities come from economic and social circumstances that are likely to limit the parents' opportunity to participate fully in the IDEA processes. "[C]hildren and youth with disabilities are more often affected by poverty." National Dissemination Center for Children with Disabilities, *Who Are the Children in Special Education*? 6 (July 2003). Indeed, almost one quarter of children with disabilities are living in poverty, compared with 16 percent of children in the general population. *See ibid.* Parents of children with disabilities are 67 percent more likely to be unemployed. *See* M. Wagner *et al.*, *The Individual and Household Characteristics of Youth With Disabilities: A Report from the National Longitudinal Transition Study-2 (NLTS-2)* at 3-4 (2003).

Even middle-income parents of children with disabilities face barriers in pressing for the appropriate education that the IDEA guarantees their child. Over 65 percent of children with disabilities live in households with incomes less than $50,000, compared to only 45 percent of nondisabled children. *See NLTS-2*, *supra*, at 3-5. At least 12 percent of families with children with disabilities with incomes below $50,000 lack adequate transportation and/or telephone service which would enable them to advocate effectively for their children. *See SEELS*, *supra*, at 35. Almost 10 percent of such families lack health insurance coverage and are not covered by Medicaid, which could cover some of the independent evaluations that may be needed to provide evidence to challenge a school's proposed education plan. *See SEELS, supra*, at 35; *NLTS-2, supra*, at ES-2. Such parents would be particularly hard pressed to advance the money necessary to provide the special education that their child needs during the pendency of any due process hearing and judicial appeals. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985) (noting that this option is available to "conscientious parents who have adequate means" and that they can recover reimbursement only if they ultimately prevail). Their need for the IEP to reach the correct result in the first instance is thus especially strong.

c. Poverty is not the only problem encountered by parents seeking to advocate on behalf of their children with disabilities. The States report that there are approximately one million homeless children and youth, 87 percent of whom are enrolled in school, and 77 percent of whom attend school regularly. *See* Office of Elementary & Secondary Educ., U.S. Dep't of Educ., *Report to Congress: Education for Homeless Children and Youth Program: Fiscal Year 2000* at 5. In addition to poverty, other characteristics associated with homelessness, such as being a single parent or suffering from illness, are likely to further impair the ability of homeless parents to advocate on behalf of their children. *See* Better Homes Fund, *Homeless Children: America's New Outcasts* 15-16 (1999); M. Burt *et al., Helping America's Homeless* 58-59, 103-104 (2001). These same circumstances occur in families at every income level, and likewise impose barriers to full participation as advocates for their children. For example, children with disabilities are more likely to live in one parent households (37 percent, compared to 27 percent for the general population). *See NLTS-2, supra*, at 3-1.

Half the States reported that students in homeless situations had difficulties accessing special education programs. *See Report to Congress, supra,* at 7-8; 150 Cong. Rec. S5353 (daily ed. May 12, 2004) (Sen. Murray). In reauthorizing the IDEA in 2004, Congress acknowledged these facts, *see id.* at S5353-S5355, and made special provisions to address some of the special needs of children experiencing homelessness. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, Sec. 101, §§ 602(11), 612(a)(3)(A), 612(a)(11)(A)(iii), 615(b)(2)(A)(ii), 615(b)(7)(A)(ii). Nonetheless, the reality is that a homeless parent is going to have, on average, less ability to advocate on behalf of his or her child at an IEP meeting or a due process hearing.

d. Some children must rely on foster parents or other surrogates to advocate on their behalf. Children with disabilities are twice as likely as other children to live with someone other than a biological parent. *See NLTS-2, supra*, at 3-1. There are nearly 500,000 children in foster care, thirty percent of whom are in special education. *See* 150 Cong. Rec. S5353 (daily ed. May 12, 2004) (Sen. Murray). Foster children with disabilities face special barriers when attempting to access special education because they are often placed in homes similar to those they were removed from – high-risk home environments characterized by poverty, instability, and adults with poor psychological well-being. *See* K. Kortenkamp & J. Ehrle, The Urban Institute, *New Federalism National Survey of America's Families: The Well-Being of Children Involved with the Child Welfare System* 4-5 (2002). These children, removed from abusive or neglectful situations, end up placed with adults not well-equipped to navigate through the special education process on their behalf. *See* C. van Wingerden *et al.*, *Education Issue Brief: Improving Special Education for Children with Disabilities in Foster Care* 3 (Casey Family Programs 2002).

2. School districts have multiple advantages over parents at IEP meetings and at due process hearings

Studies over the past 30 years have documented that school districts hold significant advantages over parents in the process for developing the IEP and at any ensuing due process hearings. These advantages demonstrate the need for the burden of proof to be on school districts to show, at any due process hearing, that the IEP developed is appropriate.

a. Many parents enter the process of developing an IEP ignorant of their rights and intimidated by the process. One study, credited by the United States Department of Education in its *amicus* brief below, "revealed that most of the parents were not aware of their rights and, consequently, failed to take advantage of the procedural safeguards provided in the statute." Brief for United States as *Amicus Curiae*, *supra*, at 16 (citing D. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 Duke L.J. 166). In another comprehensive survey by Thomas Hehir, who later became the Director of the Office of Special Education Programs at the U.S. Department of Education, special education directors reported that parents find the information they receive about their rights to be "confusing." T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors* 50 (Ed. D. Thesis, Harvard University 1990); *cf. S-1 v. Turlington*, 635 F.2d 342, 349 (5th Cir.) ("in most cases, the handicapped students and their parents lack the wherewithal either to know or to assert their rights under the [IDEA] and section 504"), *cert. denied*, 454 U.S. 1030 (1981).

Additionally, large percentages of parents feel "devalued, disrespected, and ostracized from the planning process." P. Garriott *et al.*, *Teachers as Parents, Parents as Children: What's Wrong With This Picture?*, 45 Preventing School Failure 37, 42 (Fall 2000). After conducting extensive hearings, the National Council on Disability, an independent federal agency, likewise reported that "[a]t every hearing [held by the Council], witness after witness testified that the IEP process is extremely frustrating, often intimidating, and hardly ever conducive to making them feel that they were equal partners with professionals." National Council on Disability, *Improving the Implementation of the Individuals with Disabilities Education Act: Making Schools Work for All of America's Children* 57 (1995).

b. School districts generally will have information not available to parents that is relevant in developing an IEP and at any subsequent due process hearings. "In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents." *Oberti v. Board of Educ.*, 995 F.2d 1204, 1219 (3d Cir. 1993).

While the IDEA nominally requires school districts to share with parents certain information they have about the child at issue, *see* 20 U.S.C. § 1415(f)(2)(A), only 24 percent of parents responding to a survey reported that all or nearly all records requested were made available, while 24 percent reported that no records were provided, and over half of parents reported that the school provided no explanation of whatever records were provided. *See* S. Goldberg & P. Kuriloff, *Evaluating the Fairness of Special Education Hearings*, 57 Exceptional Children 546, 550 (1991). Moreover, even though the statute requires school districts to permit parents to inspect and review a child's educational records, *see* 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(a)(1), they are not required to provide a *copy* of such records to parents unless circumstances prevent the parent from reviewing the records, *see* 34 C.F.R. § 300.562(b)(2).

But even if a school district complies with these requirements, it alone normally possesses information regarding the available education programs and services in that district and their efficacy for children confronting similar problems, or even the qualifications of the relevant teachers and staff. No formal discovery of this information is available at any stage of the administrative process under federal law. *See* 34 C.F.R. § 300.509. Thus, information regarding the likelihood that a school district's proposed IEP has worked (or not worked) in the past for other children is uniquely available to that school district. It is "entirely sensible" to place "on the party more likely to have information relevant to the facts * * * the obligation to demonstrate [the] facts." *Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993).

c. The burden of proof dictates the structure of the proceeding, determining who must present their evidence first. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (courts determine who has the burden "to help control the presentation of evidence at trial"). Unrepresented and inexperienced parents are at a disadvantage if they have to present their "case" first, not understanding what is expected of them and lacking the opportunity to model their presentation on that of the school district's experienced representative.

In some due process hearings, the hearing officer employs formal rules of evidence, such as excluding hearsay, that can be particularly difficult for lay persons to grasp and comply with. *See, e.g.*, 19 T.A.C. § 89.1185(d) (due process hearings follow Texas Rules of Evidence). Similarly, the substantive requirements of the IDEA are the type of specialized knowledge that school districts and their attorneys are more likely to possess. *See* G. Schultz & J. McKinney, *Special Education Due Process: Hearing Officer Background and Case Variable Effects on Decisions Outcomes*, 2000 B.Y.U. Educ. & L.J. 17, 29 ("Special education law is a highly complex legal area and parents win more cases when represented by an individual with legal knowledge.").

Most parents who request an impartial due process hearing will be unrepresented by counsel and will not have participated in such a hearing before. *See* 150 Cong. Rec. S5351 (daily ed. May 12, 2004) (Sen. Kennedy) ("Most parents don't have access to any attorney, or must rely on low-cost legal aid. And data from surveys shows that even this help is in short supply."). By contrast, the school district is normally represented by an attorney, a repeat player familiar with the formal and informal rules surrounding such proceedings. *See ibid.* ("Those parents who have the courage to go it alone face schools that are well represented. State data shows that in 2003 schools were much more likely to bring an attorney to a hearing than parents were.").[2] While the law allows non-attorney advocates to accompany and advise parents, *see* 20 U.S.C. § 1415(h)(1), some States do not permit such advocates to represent parents at hearings. *See, e.g., In re Arons*, 756 A.2d 867 (Del. 2000), *cert. denied*, 532 U.S. 1065 (2001).

An alarming illustration of the interaction of these school district advantages with the burden of proof is *[Redacted] v. Baltimore City Public Schools*, OAH No. MSDE-CITY-OT-200200192 (June 26, 2002), available at www.msde.state.md.us/SpecialEducation/hearing_decisions2002/02-H-CITY-192.pdf, in which the sibling-guardian of a high school student initiated a due process hearing *pro se* because she claimed her brother, who was determined to be a child with a disability eligible for special education, was not receiving any remedial classes despite the fact that he had failed the 11th grade, and that he still lacked basic living skills, such as how to read, count money, and fill out a job application. At the hearing, she attempted to introduce nine exhibits (described as summaries/reports), but the school district's attorney succeeded in excluding them under the evidentiary rules. Commenting on her lack of legal sophistication, the hearing officer faulted the guardian for failing to submit into evidence the IEP, or the assessments or evaluations of the child made by the school district. Although the school district undoubtedly possessed all evidence that might have been necessary to determine whether its educational plan for this child was appropriate under the law and whether the plan was being complied with, the school district's attorney took advantage of the burden of proof rule and offered no witnesses and no documents. In this state of equipoise, without evidence from either side, the hearing officer granted a summary decision for the school district. Congress could not have intended due process hearings to become venues for such gamesmanship.

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[2] For example, in Illinois, 95 percent of school districts but only 35 percent of parents were represented by attorneys at due process hearings. *See ibid.* Similarly, in New York, school districts used attorneys in every due process hearing, while parents had counsel at less than a third of the hearings. *See ibid.*

d. Finally, school districts can rely on existing school employees (such as counselors, social workers, and nurses) to testify at the hearings as experts in support of the proposed IEP. The parents, by contrast, if they desire experts to appear to support their position, must pay for them themselves, thus further disadvantaging middle- and low-income families. "School administrators can call on many more experts in developing their arguments than can the average parent." P. Kuriloff & S. Goldberg, *Is Mediation a Fair Way to Resolve Special Education Disputes? First Empirical Findings*, 2 Harv. Negot. L. Rev. 35, 62 (1997).

Thus, for many children who are entitled under the IDEA to a free appropriate public education, the required ardor of the parents is necessarily outweighed by a lack of resources necessary to engage school districts. Placing the burden of proof on school districts will provide a needed counterweight for these families and thus ensure that the burden of proof is on the party that "occupie[s] the position of advantage." *Tinker*, 231 U.S. at 682.

B. Placing The Burden Of Proof On School Districts Furthers The IDEA's Purpose Of Combating Historic Patterns Of Unconstitutional Treatment Of Children With Disabilities

Other important factors in determining which party should bear the burden of proof are "the policies behind the statute," along with "evidentiary probabilities" of whether the challenged action was incorrect. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring in judgment); *see also Tinker*, 231 U.S. at 682-683. Moreover, when constitutional rights are involved, the burden of proof must be calibrated to ensure that imperfect information does not result in constitutional violations. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). These factors also support placing the burden of proof on school districts, many of which were responsible for subjecting millions of children with disabilities to blatant and unconstitutional discrimination.

1. a. In enacting the IDEA's predecessor in 1975, Congress found that one million children were "excluded entirely from the public school system" because of their disabilities. 20 U.S.C. § 1400(c)(2)(C). Laws "prohibiting certain individuals with disabilities * * * from attending public schools" were part of a broader pattern of exclusion of people with disabilities from public life. *Tennessee v. Lane*, 124 S. Ct. 1978, 1995 (2004) (Souter, J., concurring). Exclusion of a child with cerebral palsy from public school, for example, "was judicially sustained in part as a justified precaution against the very sight of a child with cerebral palsy, lest he 'produc[e] a depressing and nauseating effect' upon others." *Ibid.* (quoting *State ex rel. Beattie v. Board of Educ.*, 172 N.W. 153 (Wis. 1919)).

In addition, substantial numbers of children with disabilities were given permission to enter the schoolhouse, but were learning nothing because schools failed to account for their disabilities. *See* 20 U.S.C. § 1400(c)(2)(B) & (D). "[M]illions of handicapped children 'were * * * sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" *Rowley*, 458 U.S. at 191 (quoting H.R. Rep. No. 94-332, at 2 (1975)). Thus, "[i]n the 1970s schools in America educated only one in five students with disabilities." 150 Cong. Rec. S5408 (daily ed. May 13, 2004) (Sen. Bingaman).

As explained in *Rowley*, the impetus for the IDEA included two landmark federal cases establishing that the States' failure to provide children a public education appropriate to their needs was a violation of the Constitution. *See* 458 U.S. at 180 n.2, 192-200 (discussing *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), and 343 F. Supp. 279 (E.D. Pa. 1972)). Indeed, when Congress enacted the IDEA, children were winning similar suits across the nation. *See* M. Burgdorf & R. Burgdorf, Jr., *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 878 & n.136 (1975); 143 Cong. Rec. 7864 (1997) (Sen. Jeffords) (when the IDEA was originally enacted, there were "26 State cases where it was determined that there was a constitutional right for an appropriate education."). "Parents * * * began asserting their children's rights to attend public schools, using the same equal protection arguments used on behalf of the African American children in *Brown*: the 14th amendment of the U.S. Constitution guarantees their children equal protection under the law." 150 Cong. Rec. S5408 (daily ed. May 13, 2004) (Sen. Bingaman).

Thus, in enacting the IDEA and providing federal funds to States to educate children with disabilities, Congress declared that its intent was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children *in order to assure equal protection of the law*." Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975) (emphasis added); *see also* S. Rep. No. 94-168, at 13, 22 (1975); H.R. Rep. No. 94-332, at 14 (1975); *Rowley*, 458 U.S. at 198 & n.22.

b. When Congress reauthorized the IDEA in 1997 and again in 2004, it retained this finding linking the statute to the Equal Protection Clause. *See* 20 U.S.C. § 1400(c)(6).

In reauthorizing the IDEA in 1997, Congress explained that it wished "to restate that the 'right to equal educational opportunities' is inherent in the equal protection clause of the 14th Amendment to the U.S. Constitution." S. Rep. No. 104-275, at 31 (1996); *see also id.* at 25 ("The IDEA is founded in and secured by the 14th Amendment of the Constitution."). As Senator Frist explained: "It was very clear that IDEA * * * was enacted to establish a consistent policy that people could read and understand for States and school districts to comply with. With what? The equal protection clause under the 14th amendment of the U.S. Constitution. * * * Again, it was very clear [that the IDEA was based on] * * * two landmark decisions * * * in 1972 which established the constitutional rights – not a mandate, the constitutional rights – for individuals with disabilities to receive a free, appropriate public education." 143 Cong. Rec. 7929 (1997).

This understanding of the IDEA was often reiterated during the 1997 reauthorization debates. *See, e.g., id.* at 7918 (Sen. Thomas) ("IDEA helps local schools meet their constitutional responsibilities to educate everyone"); *id.* at 7921 (Sen. Jeffords) ("This is a constitutional matter – a matter of equal protection."); *id.* at 7925 (Sen. Harkin) ("It is a civil rights bill, it is a law implementing the equal protection clause of the 14th Amendment to the U.S. Constitution."); *id.* at 8187 (Sen. Lott) ("The obligation to provide children with disabilities a free and appropriate education is grounded in the 14th amendment to the Constitution * * * .").

Similarly, in reauthorizing the IDEA again in 2004, members of Congress confirmed that the IDEA was intended to vindicate children's constitutional rights. As Senator Harkin explained:

> In 1975, Congress wrote IDEA for two reasons. First, we fleshed out the substance and details of what was required to achieve equality for children with disabilities. Congress specified critical protections for parents and children to transform the constitutional requirement into a practical reality throughout the country. * * * A second important purpose of IDEA was [to provide

> funds] to help States meet their constitutional obligations.

150 Cong. Rec. S5326 (daily ed. May 12, 2004); *see also id.* at S5353 (Sen. Murray) (IDEA "is based on the American principle of equal opportunity. IDEA recognizes that students have a civil right to a free, appropriate public education even if they have special needs that require additional resources."); *id.* at S5402 (daily ed. May 13, 2004) (Sen. Daschle) ("IDEA is more than simply an education program; it is one of our Nation's most important civil rights programs."); *id.* at S5408 (Sen. Bingaman) ("Recognizing the Constitution's guarantee of equal protection under the law, Congress created the statutory right to a free appropriate public education in the least restrictive environment.").

It is because of the close relationship between the IDEA and the Constitution that this Court held in *Smith v. Robinson*, 468 U.S. 992 (1984), that the IDEA precluded children with disabilities from bringing claims against school districts based on the Equal Protection Clause. The Court reasoned that Congress intended the IDEA to be the statutory "vehicle for protecting the constitutional right of a handicapped child to a public education." *Id.* at 1013.[3]

2. The same discriminatory conditions that impelled Congress to enact the IDEA continue to exist. After "decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities," by the Executive and Legislative branches, *Lane*, 124 S. Ct. at 1984, Congress found in enacting the Americans with Disabilities Act of 1990 that "discrimination against individuals with disabilities *persists* in such critical areas as * * * education." 42 U.S.C. § 12101(a)(3) (emphasis added).

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[3] Congress subsequently amended the IDEA to make clear that it did not intend for the IDEA to be the *exclusive* remedy for constitutional violations. *See* 20 U.S.C. § 1415(l).

This finding of persistent education discrimination is supported by testimony credited by both houses of Congress about exclusion of people with disabilities from education. *See* S. Rep. No. 101-116, at 7 (1989); H.R. Rep. No. 101-485, pt. 2, at 29 (1990). This Court in *Lane* also relied on "a special task force" created by Congress "that gathered evidence from every State in the Union," including "hundreds of examples of unequal treatment of persons with disabilities by States and their political subdivisions." 124 S. Ct. at 1984, 1990 (citing *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 391-424 (2001) (App. C to opinion of Breyer, J., dissenting)). Those examples include numerous modern instances of children with disabilities being discriminated against by public schools. This Court found that "[t]he decisions of other courts, too, document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including * * * public education." *Lane*, 124 S. Ct. at 1989; *see also Association for Disabled Americans, Inc. v. Florida Int'l Univ.*, ___ F.3d ___, 2005 WL 768129 (11th Cir. Apr. 6, 2005) (holding that Disabilities Act constitutionally abrogates States' sovereign immunity to suits involving public education).

Congress's finding of persistent discrimination in education is consistent with the conclusion of the United States Commission on Civil Rights that tens of thousands of children with disabilities "continue to be excluded from the public schools, and others are placed in inappropriate programs." U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 28 & n.77 (1983); *see also* President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* 39-40 (2002) ("[T]here are children with disabilities who are still segregated simply because their disability creates difficulties in providing integrated educational experiences. Members of this Commission viewed situations where children with severe disabilities were separated – for no apparent justifiable educational purpose – from the regular school building and consigned to secondary settings because of their disability.").

3. The undisputed fact that millions of children with disabilities were unjustifiably and unconstitutionally denied public educations for decades preceding the enactment of the IDEA warrants placing the burden of proof on school districts to show that they are currently in compliance with their constitutionally- and statutorily-mandated obligations. This was the rule adopted by this Court in cases involving racial desegregation at the time Congress first enacted the IDEA in 1975. *See Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-209 (1973) ("[A]t that point where an intentionally segregative policy is practiced in a meaningful or significant segment of a school system, as in this case, * * * it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent."). Such a burden of proof is particularly appropriate under the IDEA, in which the due process procedures are one of the mechanisms the State education agency uses to meet *its* affirmative obligation to ensure that local school districts comply with the IDEA's requirements. *See* 20 U.S.C. §§ 1412(a)(6)(A), (a)(11)(A)(ii).

Placing the burden on the school district was also the approach adopted in *Mills*, 348 F. Supp. at 881, which served as Congress's template when enacting the IDEA "due process hearing" protections. *See Rowley*, 458 U.S. at 194 & n.16. Congress's textual silence in this context can only be understood to embrace these cases.

If Congress had intended to deviate from these well-known precedents in enacting the IDEA and adopt a rule favoring school districts, it could have easily done so. To the contrary, Congress demonstrated special solicitude for children with disabilities. Congress determined that the discrimination against them was so entrenched that a simple prohibition on disability discrimination, such as that enacted in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, was not sufficient. Instead, Congress designed a statutory scheme that imposes affirmative obligations on States and local school districts that accept the federal funds targeted at special education.

In another such comprehensive civil rights statute that imposes affirmative obligations on State and local governments, it was settled at the time Congress enacted the IDEA's predecessor in 1975 that the burden of proof rests with the government. *See Georgia v. United States*, 411 U.S. 526, 538 (1973) (holding that Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, which imposes a requirement that States with a substantial history of race discrimination preclear voting changes, places the burden of proof on the State). This Court has also placed the burden of proof on the defendant at the remedial phase of civil actions when plaintiffs have established a pattern and practice of discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 359 n.45 (1977). Because the IDEA was likewise intended to constitute a remedial measure to redress a pattern of discrimination, its provisions should also be read to place the burden of proof on school districts.

C. Placing The Burden Of Proof On School Districts Encourages Them To Act Consistently With The Interests Of Children With Disabilities And Society

1. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976). Thus, placing the burden of proof on school districts will

aid petitioners and other families in due process hearings by structuring the production of evidence in a manner more favorable to the children and granting the families the benefit of the doubt when the evidence is in equipoise.

2. In addition to affecting the outcome of hearings that are held, the burden of proof at the due process hearings will alter school districts' conduct as they draft every IEP and meet with all parents. Despite the comparatively tiny number of due process hearings held,[4] each due process decision has a "systemic or ripple effect" and "thus the influence of due process extended far beyond the few students whose parents chose to use it." Hehir, *Thesis*, *supra*, at 5, 7, 11.

If a school district is aware that it will be required to show that its proposed education plan for a child meets the substantive requirements of the IDEA in any subsequent due process hearing, it will have a stronger incentive to work with the parent to reach the correct result than if it knows that the parent will bear the burden in subsequent proceedings. "The prospect of a hearing and estimations of its likely outcome shape the behavior of the participants, both in the formulation of their basic relationships and in the way they handle their disputes. The 'shadow of the law' extends well beyond the formally affected parties." D. Neal & D. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 Law & Contemp. Probs. 63, 77 (1985); *see also* J. Johnston, *Bayesian Fact-Finding and Efficiency: Toward an Economic Theory of Liability under Uncertainty*, 61 S. Cal. L. Rev. 137, 137 (1987) ("the economic incentives created by the [substantive legal] standard will depend upon the process of fault determination").

Placing the burden of proof on school districts thus will make them more open to considering the suggestions and proposals offered by the parents and more careful in developing the IEP. Even if the outcome does not change substantially, the knowledge that they will bear the burden of proof if a parent seeks a due process hearing creates greater incentives for school districts to clarify the benefits that their proposal will provide the child to avoid such subsequent proceedings.

This procedural incentive to provide an appropriate IEP is necessary to combat the strong competing incentives school districts often face on the other side. The first reaction of many school officials, pressured by short-term budgetary concerns, is to put a band aid on the most obvious needs of a child with disabilities and not address the underlying long-term issues as the IDEA requires. These incentives result from enormous political pressure to keep costs down. As one special education director explained: "If something was to eliminate due process then economics would drive [senior school officials to say] forget it, let the kids go crazy. I think due process keeps the money intact to prevent that." T. Hehir, *The Impact of Due Process on the Programmatic Decisions of Special Education Directors*, Special Educ. Leadership Rev. 63, 72 (Spring 1992). "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-865 (6th Cir. 2004); *cf.* General Accounting Office, GAO No. 03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* 11-12 (Sept. 2003) (describing school officials' objections to "costly" or "expensive" educational services that led to due process hearings). Special education directors consistently describe due process hearings as the "leverage" needed to counterbalance budgetary pressure and to protect the provision of special education. Hehir, *Thesis, supra*, at 71, 86-89, 100, 105.

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[4] Nationwide, for the six million IEPs generated each year, approximately 3000-3500 due process hearings are held. *See* General Accounting Office, GAO No. 03-897, *Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and Other Strategies to Resolve Conflicts* 1, 11-12 (Sept. 2003).

Placing the burden of proof on school districts should not, however, change the spending patterns of most school districts because most of them have been bearing the burden of proof in due process hearings for the past 30 years. Thus, there will be no increased costs in those school districts. Any increase in costs to school districts due to the burden of proof, moreover, will be the result of school districts coming into compliance with their existing substantive obligations, a result about which they can hardly be heard to complain.

Placing the burden on school districts is unlikely to increase the total number of due process hearings. As noted above, most parents are, for a variety of reasons, relatively ignorant about their procedural rights under the IDEA. Thus, who bears the burden of proof (a relatively abstract concept for non-lawyers to begin with) is unlikely to alter their behavior one way or the other. By contrast, placing the burden of proof on school districts will continue to create the incentive to provide the free appropriate public education that they are obligated to provide.

3. Society as a whole benefits when school districts comply with the IDEA and provide the individualized educational and related services to which every child with a disability is entitled. "A chief selling point of the Act was that although it is penny dear, it is pound wise – the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children grow to become productive citizens." *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181-182 (3d Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989). For example, three years of intensive early intervention with a child with autism, at a total cost of $33,000 to $60,000, has been estimated to save society between $187,000 to $203,000 by the time the child turns 21, and as much as $1,082,000 by age 55 because fewer government services and subsidies are required. *See* J. Jacobson *et al.*, *Cost-Benefit Estimates for Early Intensive Behavioral Intervention for Young Children With Autism*, 13 Behavioral Interventions 201, 212-214 (1998).

Congress's expectation when it first enacted the IDEA was that "[w]ith proper education services, many [individuals with disabilities] would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, at 9; *see also* 20 U.S.C. § 1400(d)(1)(A) (providing a free appropriate special education will "prepare them for employment and independent living"); *Rowley*, 458 U.S. at 201 n.23. By contrast, "[i]f families with kids with disabilities are not getting the [special education and] supportive services * * * then all of the promises of the Americans with Disabilities Act [are] for naught because these kids will not get the education they need that will give them equal opportunity, full participation, independent living, and economic self-sufficiency." 150 Cong. Rec. S5344 (daily ed. May 12, 2004) (Sen. Harkin).

Congress also recognized that delay in providing appropriate education to children with disabilities is "extremely detrimental" because it can "result in a substantial setback in the child's development." 121 Cong. Rec. 37,416 (1975) (Sen. Williams). For certain disabilities, such as autism or learning disabilities, if the proper special education is not provided at an early age, the window of opportunity for treating the disability may pass completely. *See, e.g.*, *JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005); *Town of Burlington v. Department of Educ.*, 736 F.2d 773, 798 (1st Cir. 1984), *aff'd on other grounds*, 471 U.S. 359 (1985).

Due process hearings are thus not equivalent to simple civil actions about money, where society is generally indifferent as to which party bears the risk of error. *Cf. In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring). Given the high individual and societal costs involved in denying a child – even temporarily – the appropriate public education to which he or she is entitled under the IDEA, the burden of proof properly is placed on school districts to avoid the risk of error and encourage compliance with the law. *See* T. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 BYU L. Rev. 1, 21 ("Placing the burden of proof on a defendant may be justified on the ground that an erroneous decision in defendant's favor is more costly than an erroneous decision for plaintiff.").

CONCLUSION

For the reasons set forth above and in petitioners' brief, the judgment of the Fourth Circuit should be reversed and the case remanded for further proceedings.

Respectfully submitted,

DREW S. DAYS, III
Counsel of Record
SETH M. GALANTER
LINDA A. ARNSBARGER
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., NW
Washington, DC 20006
(202) 887-1500

Counsel for Amici Curiae

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IN THE
Supreme Court of the United States

BRIAN SCHAFFER, a Minor, By His Parents and Next Friends,
JOCELYN and MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent,
MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIEF OF VIRGINIA SCHOOL BOARDS ASSOCIATION AND FIVE OTHER SCHOOL BOARD ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

KATHLEEN SHEPHERD MEHFOUD
REED SMITH LLP
901 E. Byrd St.
Suite 1700
Richmond, VA 23219
(804) 344-3421

JOSEPH THOMAS TOKARZ, II
Counsel of Record
P.O. Box 27032
Richmond, VA 23273
(804) 501-4351

Counsel for the Virginia School Boards Association

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Should the Court upset the careful balancing of procedural protections for parents and local school boards in the Individuals with Disabilities Education Act when Congress has not expressed an intent to upset the traditional burden of proof in administrative hearings initiated under the Act?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The traditional rule is that the party requesting an administrative hearing has the burden of proof. The amici urge the Court to follow the traditional rule in cases arising under the Individuals with Disabilities Education Act ("IDEA" or the "Act") unless Congress or the State explicitly reverses the customary burden by statute. Such a course would be consistent with IDEA's intentional policy choices and the careful balance of procedural protections for parents and local school boards in the Act.

Both parties have consented to the filing of this brief.

Interest of Virginia School Boards Association

The Virginia School Boards Association ("VSBA") is a private, voluntary non-partisan organization representing every local school board in Virginia (the "Commonwealth"). VSBA's primary mission is the advancement of education through local control of the public schools. VSBA's members are the school divisions that actually teach students.

The VSBA has a particular interest in this case because the Attorney General of Virginia ("Attorney General") prepared and filed an amicus brief, purportedly on behalf of the Commonwealth. Brief of the Commonwealth of Virginia and Eight Other States as Amicus Curiae in Support of the Petitioners ("amicus brief"). However, the Attorney General did not consult with local school boards or VSBA before deciding to file the amicus brief.

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[1] This brief was not written in whole or in part by counsel for a party. The preparation of this brief was funded by the Virginia School Boards Association.

Furthermore, the amicus brief does not represent the views of the General Assembly of Virginia ("General Assembly"), the State Board of Education ("State Board"), the Superintendent of Public Instruction ("State Superintendent"), or local school boards — even though these are the entities responsible for implementation of IDEA in the Commonwealth. Nor does it represent the position of the Governor of Virginia or Virginia courts.

The amicus brief does not represent the views of the General Assembly. Under the Constitution of Virginia, the General Assembly must provide for public education in the Commonwealth. Va. Const. art VIII, § 1. The General Assembly has not assigned the burden of proof in due process hearings mandated in Va. Code § 22.1-214.

The amicus brief does not represent the views of the State Board or the State Superintendent. These entities have the responsibility for overseeing and administering public education in the Commonwealth. Va. Const. art. VIII, §§ 4-6; Va. Code §§ 22.1-8; 22.1-23. The State Board's special education regulations contain elaborate procedures for due process hearings, but they do not assign the burden of proof to either party. 8 VAC 20-80-76. The State Superintendent has not assigned the burden of proof by interpretation or administrative guidance.

Moreover, in response to widespread consternation concerning the Attorney General's intention to file the amicus brief, the State Superintendent's Office notified all local school superintendents in writing on April 28, 2005 "that the Attorney General's office did not consult with the Department of Education or the Board of Education in this matter, and we have stated our opposition to the filing of this brief with the Attorney General's Office."

The amicus brief does not represent the views of local school boards. These bodies have the responsibility for supervising and operating the Commonwealth's public schools. Va. Const. art. VIII, § 7; Va. Code § 22.1-28. The Attorney General did not consult with VSBA or local school boards before deciding to file its amicus brief.

In addition, the Governor of Virginia has not taken any public position on the burden of proof. VSBA has notified the Governor's Office of its opposition to the amicus brief, and the Governor has not indicated that he supports its filing.

Finally, the amicus brief does not represent the opinion of Virginia courts. In fact, the only Virginia case deciding the issue is a 1981 ruling by the U.S. District Court for the Eastern District of Virginia that the burden is on parents. *Bales v. Clark*, 523 F. Supp. 1366, 1370 (E.D. Va. 1981).

Interest of Minnesota School Boards Association

The Minnesota School Boards Association ("MSBA") is a voluntary, nonprofit organization which represents members of the school boards of all 344 public school districts in Minnesota. The mission of MSBA is to support, promote, and enhance the work of school boards and school districts throughout Minnesota.

MSBA has a particular interest in this case because the Minnesota legislature enacted Minn. Stat. § 125A.091, subd. 16, in 2003. This statute was enacted, in part, to codify the holding of the Eighth Circuit in *E.S. v. Indep. Sch. Dist. No. 196*, 135 F.3d 566 (8th Cir. 1998), a Minnesota case.

The 2003 statute generally places the burden of proof in special education due process hearings on school districts, regardless of whether the school district is the complaining party.[2] However, the burden is on the parent to show that a private school placement is appropriate if the parent seeks private school tuition reimbursement, as in the case before the Court.

MSBA did not support enactment of this legislation and submits that, with the exception of the rule governing private school tuition claims, Minn. Stat. §125A.091, subd. 16 exceeds what should be required of school districts under the IDEA. MSBA would welcome a ruling by the Court that the burden of proof is on the complaining party.

MSBA is equally interested in this case because Minnesota's Attorney General joined the amicus brief of the Attorney General of Virginia without consulting the state's local school boards or MSBA. MSBA submits that the views of the Minnesota Attorney General on this issue do not reflect those of MSBA or of the 344 public school districts in Minnesota.

Interest of Texas Association of School Boards Legal Assistance Fund

Nearly 800 Texas public school districts are members of the Texas Association of School Boards Legal Assistance Fund. The Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards ("TASB"), the Texas Association of School Administrators, and the Texas Council of School Attorneys.

The Texas Association of School Boards is a nonprofit corporation. Approximately 1,045 Texas public school districts, through their elected board of trustees, are TASB members. TASB assists school boards by providing leadership, educational materials, technical services, and legislative and policy services.

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[2] Minn. Stat. § 125A.091, subd. 16 states: "The burden of proof at a due process hearing is on the district to demonstrate, by a preponderance of the evidence, that it is complying with the law and offered or provided a free appropriate public education to the child in the least restrictive environment. If the district has not offered or provided a free appropriate public education in the least restrictive environment and the parent wants the district to pay for a private placement, the burden of proof is on the parent to demonstrate, by a preponderance of the evidence, that the private placement is appropriate."

The Texas Association of School Administrators represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

The Texas Council of School Attorneys is composed of school attorneys who represent more than 90 percent of the public school districts in Texas.

The Legal Assistance Fund has a particular interest in this case because the well-settled rule in the Fifth Circuit, which reviews cases arising in Texas, is that the party who challenges an IEP has the burden of proof. *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). Any change in this long-standing rule would upset the balance of procedural protections in due process hearings in Texas.

Interest of Connecticut Association of Boards of Education

The Connecticut Association of Boards of Education ("CABE") is a non-profit association representing the vast majority of public school boards and their members in the state of Connecticut. CABE provides education and training for public school board members, delivers legal advice on school law issues, develops and

recommends policies for school boards, and represents boards of education at the state and national level before the legislature and the courts.

CABE has participated as amicus curiae in numerous cases affecting public education in Connecticut. CABE has a particular interest in this case because Connecticut law currently places the burden of proof on parents in due process hearings. Therefore, a decision to place the burden of proof on school boards will reverse current law in Connecticut and would place an unnecessary burden on its school boards.

Interest of Kansas Association of School Boards

The Kansas Association of School Boards ("KASB") is a voluntary, nonprofit organization that represents members of the school boards of 298 of the 301 public school districts in Kansas. KASB provides education and training for public school board members, delivers legal advice on school law issues, develops and recommends policies for school boards, and represents boards of education at the state and national level before the legislature and the courts.

KASB has a particular interest in this case because Kansas due process hearing officers and the courts in Kansas have generally followed the Tenth Circuit's holding in *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990), which places the burden of proof on the party challenging the action, generally the parents.

KASB is also interested in this case because the Kansas Attorney General joined the amicus brief of the Attorney General of Virginia without consulting the state's local school boards or KASB. KASB submits that the views of the Kansas Attorney General on this issue do not reflect those of KASB or of the 301 public school districts in Kansas.

Interest of Illinois Association of School Boards

The Illinois Association of School Boards ("IASB") is a voluntary nonprofit organization of local school boards organized under § 23-1 of the Illinois School Code, 105 ILCS 5/23-1 et seq. Over 95 percent of the state's 893 public school districts are active members of IASB. IASB is governed by a Board of Directors composed of school board members across Illinois, and is dedicated to strengthening and improving Illinois' public schools.

Specifically, IASB assists member school districts in developing and implementing school board policies and meeting federal and state student achievement standards. IASB also advocates the adoption of policies that promote efficient and effective operation of school districts that are consistent with statutory and constitutional guidelines.

The mission of the IASB is excellence in local school governance and support of public education.

SUMMARY OF ARGUMENT

VSBA urges the Court to follow the traditional rule because Congress and most States have not assigned the burden of proof to school boards when parents initiate the hearing. Their decisions not to do so recognize that IDEA contains an extensive set of procedural protections that are carefully balanced to protect the rights of parents and school boards.

Congress has reauthorized 20 U.S.C. § 1400 *et seq.* four times since its initial enactment as the Education of All Handicapped Children's Act in 1975. In the 1997 reauthorization, it expressly imposed the burden of proof on local school boards in cases involving misconduct by disabled students, but it has not chosen to do so in any other situation.

Furthermore, Congress deliberately rescinded its allocation of the burden in misconduct cases in the 2004 reauthorization. Given IDEA's legislative history, the Court should reject the invitation of the amicus brief to "continue this [IDEA's] transformation of education for disabled children" by adopting a burden of proof requirement that Congress has not chosen to impose.

There is no need to depart from the traditional rule allocating the burden of proof to the party initiating the hearing because Congress and the States have the power to act otherwise if they deem it appropriate. Furthermore, there are valid policy reasons for not overturning the traditional rule.

ARGUMENT

THE COURT SHOULD ALLOW CONGRESS AND THE STATES TO DETERMINE IF THEY WISH TO CHANGE THE TRADITIONAL ALLOCATION OF THE BURDEN OF PROOF.

It is axiomatic that Congress may explicitly choose to allocate the burden of proof in due process hearings by amending the Act.

Significantly, a Congressional decision to allocate the burden of proof by statute involves constitutional considerations. Because IDEA is legislation enacted pursuant to the Spending Clause of the U. S. Constitution, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 204 n 26 (1982) (citing *Pennhurst State Sch. v. Halderman,* 451 U.S. 1, 17 (1981)). Because Congress has not unambiguously assigned the burden of proof in IDEA, judicial action altering the traditional rule would change the requirements of the contract States entered into under the Act.

Similarly, States may choose to provide procedural protections consistent with, and even beyond, those provided by IDEA. *Fowler v. Unified Sch. Dist. No. 259,* 128 F.3d 1431, 1438 (10th Cir. 1997) (citation omitted).

Because Congress and the States have the power to act, the Court should leave any change of the traditional rule to them.

(1) The Court Should Not Substitute Its Judgment For That Of Congress And The States.

The Attorney General asks the Court to substitute its judgment for that of Congress and the States which have chosen not to alter the traditional allocation of the burden of proof in most due process hearings. VSBA respectfully submits that this step would unwisely override intentional policy choices made by Congress and the States.

On the federal level, Congress has made a purposeful decision not to alter the traditional burden of proof in most hearings. Only in cases of misconduct by disabled students has Congress chosen to do so. In fact, not only did Congress impose the burden of proof in such cases in the 1997 reauthorization of IDEA, it chose to rescind its action in the 2004 reauthorization. Taken collectively, these actions show Congress making deliberate policy choices on the burden of proof issue.

To illustrate, Congress provided in the 1997 reauthorization that when parents challenge a school board's manifestation determination in cases of student misconduct, "the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability." 20 U.S.C. § 1415(k)(6)(B)(i). In addition, the 1997 version of IDEA mandated that when a hearing officer reviews a decision to place a child in an interim alternative educational setting because of the student's behavior, the hearing officer must determine "that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." 20 U.S.C. § 1415(k)(2)(A).

However, effective July 1, 2005, Congress changed these provisions. Under the 2004 reauthorization, IDEA does not impose any proof requirements on school districts in misconduct cases initiated by parents. Instead, it simply grants authority for the hearing officer to order a change in placement "if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." P.L. 108-446 § 615(k)(3)(B)(ii)(II). This common-sense change recognizes the difficulties for teachers and other students inherent in cases of misconduct by disabled students in the public school setting.

While it has chosen not to impose the burden of proof on school boards when parents initiate an administrative hearing, Congress has provided an "elaborate set" of protections to parents in IDEA to offset the "natural advantage" of school officials. *Sch. Committee of Town of Burlington v. Bd. of Educ.*, 471 U.S. 359, 368 (1985).

For example, parents have the right to independent educational evaluations, 20 U.S.C. § 1415(b)(1), and private school tuition, 20 U.S.C. § 1412(a)(10)(C), at public expense if school boards do not fulfill their statutory duties. Parents have detailed rights to file administrative and judicial challenges to school board actions. 20 U.S.C. § 1415. The Act's procedural safeguards also include an entitlement to attorneys' fees for parents, but not school boards, who prevail in administrative and judicial proceedings. 20 U.S.C. § 1415(i)(3).

Because Congress has made a deliberate decision not to alter the traditional burden of proof in most administrative hearings, the Court should not override Congressional intent.

Similarly, States are fully able to consider local circumstances that may justify a change from the traditional allocation of the burden of proof in a particular State. The Attorney General correctly notes that Minnesota did so by statute in 2003. Minnesota Statute, § 125A.091, subd. 16.

However, although the Attorney General claims that "many" states "would be willing" to allocate the burden of proof to local school districts by statute, it is telling that the Attorney General can only point to Minnesota as actually having done so. Amicus Brief, 3 n 6.

The collective policy judgment by most States not to deviate from the traditional rule for allocating the burden of proof is additional justification for the Court's deference to Congress and the States.

(2) Congress And The States Have Valid Policy Reasons For Not Allocating The Burden Of Proof To Local School Boards.

The Attorney General argues that a local school board should have the burden of proving that its proposed individualized education program complies with IDEA when parents request a due process hearing to contest it. However, this contention undercuts key premises of federal special education law.

The Court has long recognized that state and local education officials have the "primary responsibility" for public education. *Rowley,* 458 U.S. at 230 n 30. Thus, courts have given great deference to the professional judgment of local educators.

Furthermore, the Court has also stated that "[i]t is clear that Congress was aware of the States' traditional role in the formulation and execution of education policy." *Id.* at 208. Therefore, the Court recognized that while Congress included extensive procedural requirements in P.L. 94-142, "it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to 1415(e)(2)." *Id.* at 207-08.

The Attorney General's position ignores this judicial and statutory context. Moreover, it contradicts the presumption of regularity normally accorded to governmental actions.

The Attorney General justifies its position on the ground of "fairness." However, given the numerous procedural protections afforded to parents in IDEA, Congress and the States could, and have, reasonably determined that the Act's statutory scheme is "fair" in light of competing policy considerations. The Court should not substitute its judgment for this legislative weighing of competing policies affecting "fairness."

For example, local school boards bear the responsibility and financial burdens of the Act, but Congress has fallen far short of allocating sufficient funds to meet IDEA's requirements. This shortfall necessitates difficult local decisions in determining how to allocate limited public resources between disabled students and the diverse educational needs of the general student population. Local school boards are painfully aware that every dollar spent in adversarial meetings and litigation is a dollar diverted from instruction of other students in gifted, vocational, regular, and special education.

Congress is also aware that often there may be little disparity in resources and sophistication of parents and school boards in special education cases. In the Commonwealth, for example, school boards range in size from 164,767 students in Fairfax County in northern Virginia to 298 students in Highland County in western Virginia.

Given parents' rights to attorneys' fees and independent educational evaluations at public expense, many parents are fully prepared to vigorously represent themselves and their children.

Indeed, this case, as well as thousands of others in the 20-plus years since *Rowley*, vindicates the Court's observation that "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Rowley*, 458 U.S. at 209 (footnote omitted).

In addition, some state agencies represent parents for little or no cost in due process hearings. For example, the Virginia Office of Advocacy and Protection performs this task for some disabled students in the Commonwealth.

Moreover, Congress understands that going beyond the procedural protections already afforded by the Act will inevitably result in increased confrontation at every step of the special education process. The resulting costs of this increased confrontation would be highly detrimental to all public school students because of the diversion of time, energy and resources from instruction.

Congress has carefully calibrated IDEA to balance these competing interests. The Act has led to great strides in the education of disabled students. Disabled pupils and their parents are no longer on the outside looking in. However, against a backdrop of limited public funds, any shift in the balance of public obligations to disabled children will have potentially serious effects on other equally deserving students.

While the concept of "fairness" is one to which everyone can subscribe, there are many policy dimensions to the concept of "fairness." Congress, with its power to appropriate federal assistance to the States, is best equipped to consider all such dimensions on a national level. Congress did so with great care when establishing the detailed procedural protections in IDEA. And States, if they disagree with the legislative judgment of Congress, are fully able to add further protections in their educational statutes.

CONCLUSION

For the reasons stated above and in the other briefs supporting Jerry Weast and the Montgomery County School Board, the judgment of the Fourth Circuit Court of Appeals should be AFFIRMED.

Respectfully submitted,

Joseph Thomas Tokarz, II
P. O. Box 27032
Richmond, VA 23273
(804) 501-4351
(804) 501-4140 (fax)

Kathleen Shepherd Mehfoud
Reed Smith LLP
901 E. Byrd St.
Suite 1700
Richmond, VA 23219
(804) 344-3421 (phone)
(804) 344-3410 (fax)

Counsel for the Virginia School Boards Association

Additional counsel:

Patrice A. McCarthy
Deputy Director and
General Counsel
Kelly Balser Moyher
Senior Staff Attorney
Connecticut Association of
Boards of Education
81 Wolcott Hill Road
Wethersfield, CT 06109
(860) 571-7446 (phone)
(860) 571-7452 (fax)

Kathleen Wells
General Counsel
Legal Assistance Fund
Texas Association of School Boards
P.O. Box 400
Austin TX 78767-0400
(800) 580-5345 (phone)
(512) 467-3610 (phone)
(512) 467-3522 (fax)

Thomas S. Deans
General Counsel, Minnesota
School Boards Association
Knutson, Flynn & Deans, P.A.
1155 Centre Pointe Drive, Suite 10
Mendota Heights, MN 55120
(651) 222-2811 (phone)
(651) 225-0600 (fax)

Cynthia Lutz Kelly
Kansas Association of School
Boards
1420 SW Arrowhead
Topeka, KS 66604
(785)273-3600 (phone)
(785) 273-7580 (fax)

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No. 04-698

IN THE
Supreme Court of the United States

BRIAN SCHAFFER, a Minor, By His Parents and Next Friends, JOCELYN AND MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENTS

JUDITH S. BRESLER
ERIC C. BROUSAIDES
REESE & CARNEY, LLP
Charter Drive 10715
Columbia, MD 21044
(301) 621-5255

JEFFREY A. KREW
4785 Dorsey Hall Drive
Suite 120
Ellicott City, MD 21042
(410) 997-6900

MAREE F. SNEED*
JONATHAN S. FRANKLIN
GREGORY G. GARRE
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

ZVI GREISMANN
MONTGOMERY COUNTY
PUBLIC SCHOOLS
850 Hungerford Drive
Rockville, MD 20850
(301) 279-3549

* Counsel of Record

Counsel for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, incorporates the customary federal rule that the party that initiates the hearing and seeks relief bears the burden of proof in that proceeding.

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IN THE

Supreme Court of the United States

No. 04-698

BRIAN SCHAFFER, a Minor, By His Parents and Next Friends, JOCELYN AND MARTIN SCHAFFER,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County Public Schools, and the BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

BRIEF FOR RESPONDENTS

INTRODUCTION

The question presented in this case is which party bears the burden of proof in due process hearings initiated pursuant to § 1415(f) of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The court of appeals held that IDEA allocates the burden of proof "to the party initiating the proceeding and seeking relief." Pet. App. 6. In this case, that means the burden lies with the parents, since they initiated the administrative proceeding to challenge the adequacy of the school district's Individualized Education Program (IEP) for their child. But the rule applies both ways. In other situations, the school district may initiate the proceeding, and it likewise bears the burden of proof when it does so. That is the manner in which the burden of proof is overwhelmingly allocated in judicial as well as administrative proceedings, and there is no evidence that Congress intended to depart from that time-honored rule in IDEA. To the contrary, as explained below, the text and history of IDEA compel the conclusion that Congress intended to incorporate the customary burden of proof.

Invoking notions of "policy and fairness" rather than principles of statutory construction, petitioners ask this Court to adopt an extraordinary rule imposing the burden of proof on school districts in *any* hearing under IDEA, including those initiated by parents. That rule would impose an additional, unstated burden on local schools implementing an underfunded federal mandate—a burden that Congress has not seen fit to impose on its own federal agencies. Moreover, the rule impugns the judgments of state and local educators that retain "primacy" over the field of education under IDEA. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 208 (1982). Petitioners' rule would require schools to affirmatively justify IEP decisions whenever they are challenged, even in generalized terms—subjecting state and local educators to a presumption of invalidity. Furthermore, a rule that IEPs are presumptively invalid will only invite additional litigation. IDEA hearings are expensive, take special education teachers out of the classroom, and foster an adversarial relationship between parents and schools—costs that ultimately divert scarce resources from the education of *all* children.

The facts of this case—which petitioners and their amici would have the Court ignore—illustrate why the traditional burden is appropriate in the IDEA setting. Brian Schaffer was enrolled in a private school when he was diagnosed with a non-severe learning disability. His parents contacted the Montgomery County Public Schools (MCPS), the local public school district, which diligently prepared an IEP for Brian with input from his parents. The parents rejected all of MCPS's efforts to accommodate their requests, objected to the IEP, and then filed a due process complaint against the school, seeking to have MCPS pay for tens of thousands of dollars in private school tuition. In an initial hearing, an administrative law judge (ALJ) applied the customary burden of proof and upheld the IEP. When the burden of proof was

reallocated to the school district, however, the ALJ held the IEP invalid and ordered the school district to pay Brian's private tuition costs. Yet the ALJ consistently found that the facts strongly suggested that the parents had sought all along to "obtain funding from MCPS for a predetermined decision" to send Brian to private school. Pet. App. 113, 146-147 n.6.

This kind of litigiousness and even gamesmanship will only be encouraged if school districts are always required to affirmatively justify every challenged element of an IEP—as they would be required to do under petitioners' rule. The Court should reject that rule and affirm the decision below.

STATEMENT OF THE CASE

1. IDEA establishes a cooperative federalism program designed to ensure that every disabled child in America has access to "a free appropriate public education"—or FAPE—"that emphasizes special education and related services." 20 U.S.C. § 1400(d)(1)(A).[1] The Act reaffirms that States and "local educational agencies," or school districts, "are primarily responsible for providing an education for all children with disabilities," but finds that "it is in the national interest that the Federal Government have a role in assisting States and local efforts to educate children with disabilities." 20 U.S.C. § 1400(c)(6). IDEA authorizes federal financial assistance to States and local school systems to support them in those efforts. 20 U.S.C. § 1411(a)(1). And the Act, in turn, requires school systems that receive such federal assistance to make available FAPE to all children with disabilities in their jurisdiction. 20 U.S.C. § 1412(a)(1).[2]

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[1] Unless otherwise noted, citations to IDEA are to the Act reauthorized in 2004, which has an effective date of July 1, 2005.

[2] FAPE does not mean the most optimal level of services, but rather "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. That standard leaves ample flexibility

To comply with IDEA, school districts must identify students with disabilities and establish an IEP for them. 20 U.S.C. § 1414(d)(2)(A). An IEP is a written statement that is developed through a collaborative process by a team including teachers, school administrators, and the child's parents. 20 U.S.C. §§ 1401(14), 1414(d)(1)(B). Although parents are entitled to participate in the development of their child's IEP, the "local educational agency"—*i.e.*, the school district—is responsible for producing an IEP at the beginning of the school year for each child and periodically reviewing the IEP and revising it as appropriate. *See* 20 U.S.C. § 1414(d)(1)(A), (d)(4)(A). If parents believe that an IEP is inadequate, they may challenge it by filing a complaint and requesting a "due process hearing." 20 U.S.C. § 1415(f). If parents are unhappy with the outcome of that proceeding, they may bring a civil action. 20 U.S.C. § 1415(i)(2).

As Congress found in 2004, since the statute was originally enacted in 1975 as the Education for All Handicapped Children Act (EHA), IDEA "has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities." 20 U.S.C. § 1400(c)(3). Today, more than 6.4 million children—13.4 percent of the public school enrollment in America—receive special education services through IDEA. U.S. Dep't of Education, *Digest of Education Statistics 2003*, Table 54 (Dec. 2004). Thousands of teachers, administrators, and health professionals devote their efforts daily to the education of children with disabilities in order to fulfill the requirements of IDEA and, more to the point, their own aim to provide the best education possible to those in their care.[3]

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for the judgment of state and local educators and takes into account the numerous demands on scarce education resources.

[3] The average spending per special education pupil is about $12,600 a year—more than $8000 of which is for special education services—compared with about $6500 for a regular student. U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress on the Implementation of the IDEA*, I-22, I-26 (2002). The vast majority of this spending is paid for by state and local governments. In 1999-2000, for example, school districts received only $3.7 billion in federal assistance under IDEA, or about $605 per student. *Id.* at I-32 to I-33. This amounts to only 10.2 percent of the added costs imposed by IDEA. *Id.* at I-33 n.16.

2. MCPS is the 17th largest school system in the country with 192 schools and an enrollment of 139,337 in 2004-2005. *See* MCPS, *About Us*, *at* http://www.mcps.k12.md.us/about/. MCPS is governed by the Montgomery County Board of Education and the Superintendent of Schools, respondents here. The vast majority of its annual budget—about three quarters—is funded by local taxpayer resources. *Id.* State funding accounts for 17.3 percent and federal funding for about 3.5 percent of the funds received by MCPS. *Id.*

MCPS is a "local educational agency," 20 U.S.C. § 1401(19), responsible for ensuring that each disabled child within its jurisdiction receives a FAPE. In 2003-2004, MCPS provided special education services to more than 17,000 students, about 12 percent of the total student population, in general education schools, special centers, and nonpublic special education schools. MCPS, *The State of Special Education, School Year 2004-2005*, at 4-5, *at* http://www.mcps.k12.md.us/departments/specialed/resources/StateCIT.pdf. MCPS's current budget allocates $312 million for special education services, including transportation and special education teachers, and $32 million for the payment of private tuition for some 650 children with disabilities who have received private placements at non-MCPS schools. MCPS has more than 3000 special education positions, including special education teachers, psychologists, and social workers.

MCPS consistently ranks as one of the Nation's most successful school districts. Twenty-nine MCPS schools have been named National Blue Ribbon Schools by the U.S. Department of Education. All 23 MCPS high schools with twelfth-graders were recently recognized as among the top 800 high schools in the Nation for academics. Barbara Kantrowitz, *The 100 Best High Schools in America*, Newsweek (May 16, 2005). MCPS won the 2004 U.S. Senate Productivity Award for Maryland, the largest school system in the Nation to have won a state productivity award for best exemplifying a management philosophy that focuses on continuous improvement in the pursuit of excellence.

3. Petitioner Brian Schaffer, now a college student, was diagnosed as a child with attention deficit hyperactivity disorder. Pet. App. 75. Brian's parents enrolled him in the Green Acres School from pre-kindergarten through seventh grade. Green Acres is a private school in Maryland with no special education program. *Id.* at 76. In October 1997, at the beginning of the seventh grade, Brian was placed on academic probation, *id.*, and Green Acres informed his parents that Brian "needed a placement for the next school year in a school designed to address his learning difficulties." *Id.* at 77. A month later, Brian's mother contacted a special education teacher at Herbert Hoover Middle School (Hoover), Brian's "home" MCPS school. She asked for an evaluation of Brian's eligibility to receive special education services the following school year, but told the teacher that she was looking to place Brian in another private school. *Id.* at 77-78. In December 1997, Brian's parents applied to have Brian admitted to the McLean School of Maryland, a private school not certified as a special education school. *Id.* at 79.

On February 26, 1998, MCPS convened an initial IEP Team meeting and obtained permission from Brian's parents to assess his eligibility for special education. *Id.* at 80-82. The meeting was attended by Brian's parents, the Hoover principal and assistant principal, an MCPS special education teacher, an MCPS psychologist, an MCPS speech/language pathologist, the head of the middle school at Green Acres, and attorneys for the parents and MCPS. *Id.* at 80-81. The Team discussed Brian's education history and test results and decided to conduct additional assessments and to reconvene and evaluate Brian's needs in the light of all data it had acquired. *Id.* at 81-82. Less than three weeks later—and while MCPS was still evaluating Brian—Brian's parents accepted a placement for Brian at the McLean School and paid a non-refundable enrollment fee. *Id.* at 82.

The IEP Team met again to discuss Brian's needs on April 6, 1998. An attorney for Brian's parents was present. *Id.* at 85. The IEP Team considered reports prepared by special educators within MCPS after their evaluation of Brian as well as private assessments obtained by Brian's parents. The IEP Team identified Brian as a student with a speech-language disability and a learning disability. *Id.* at 86. An MCPS speech/language expert, however, disagreed in part with the private expert hired by Brian's parents who believed Brian had an auditory processing disorder. *Id.* at 84. In accordance with IDEA's "least restrictive environment" mandate (20 U.S.C. § 1412(a)(5)(A)), the Team prepared an IEP that placed Brian at Hoover. Pet. App. 86. The IEP called for Brian to receive 15.3 hours of special education per week through an inclusion model and 45 minutes of speech-language therapy in a small group setting each week, as well as 45 minutes of reading/writing support in a self-contained special education classroom each day. *Id.* Under the inclusion model, a separate, dedicated special education teacher would work exclusively with a small group of 5-6 students within a regular classroom. *Id.* at 87.

At the meeting, Brian's parents expressed concern with the class sizes at Hoover. MCPS then offered to implement the IEP at Robert Frost Middle School (Frost), which was located ten minutes from Brian's home and would permit Brian to be placed in a higher number of small, self-contained special education classes. *Id.* at 89-90. Although the parents left the IEP meeting indicating that they would contact MCPS after reviewing the IEP and observing the proposed placements at both schools, they visited only one school (Frost). *Id.* at 89. On May 5, 1998, the parents sent a letter to MCPS stating that the proposed IEP placed Brian in classes that were too large and unstructured, and that they had decided to enroll Brian in the private McLean School for the 1998-1999 school year. *Id.* at 90-91.

Three weeks later, Brian's parents, through an attorney, filed a due process complaint against MCPS and request for a hearing under IDEA alleging that the IEP developed for Brian was inadequate. J.A. 10-13. They declined to pursue mediation of their claim before any hearing. J.A. 10. They sought reimbursement of the tuition and other expenses for Brian to attend the private McLean School. Pet. App. 4.

4. Petitioners' due process complaint was referred to an administrative law judge (ALJ) in the Maryland Office of Administrative Hearings, which is responsible for handling IDEA complaints in Maryland. *See* Md. Code Ann. Educ. § 8-413(c). A three-day hearing was held at which both parties were represented by counsel. Pet. App. 121. The ALJ issued a decision in favor of MCPS, holding that Brian "would obtain significant, measurable educational benefit during the 1998-1999 school years" at either of the two schools offered by MCPS in the challenged IEP. *Id.* at 156.

In reaching that result, the ALJ found that MCPS's experts were credible and well-qualified, but "question[ed] the probative value" of the parents' experts—one of whom had not even examined Brian. *Id.* at 149, 150, 153. Despite such deficiencies, the ALJ stated that the diverging expert testimony made the burden of proof "critical." *Id.* at 144. The ALJ held that, "[w]here there has been an IEP formulated with no procedural safeguards violated, the party attacking the IEP should bear the burden of showing why the IEP and the educational setting are not appropriate," *id.* at 145-146, and concluded that petitioners failed to meet that burden. *Id.* at 156. The ALJ further found that Brian's

parents had made only a "mock effort" to participate on the IEP Team and had "never approached their interaction with MPCS as a partnership," and that their conduct "strongly suggest[ed] a design * * * to simply obtain funding from MCPS for their predetermined decision" to enroll Brian in private school. *Id.* at 146-147 n.6.

The parents appealed to the United States District Court for the District of Maryland. The district court held that the ALJ should have placed the burden of proof on the school district, and remanded the case to the ALJ. *Id.* at 68-69.[4] In a second hearing based on the same record, the ALJ found that "the key fact in dispute is whether [Brian] experiences a 'central auditory processing' problem, and if so, the impact of that disability on his ability to learn." *Id.* at 103. The ALJ stated that, "[i]n resolving this dispute of fact, the ALJ must accept one expert's opinion and reject the other." *Id.* at 105. Because "MCPS now bears the burden of proof," the ALJ rejected MCPS's expert testimony and accepted petitioners' expert on that "key" issue, *id.*, and this time concluded that MCPS had failed to meet its burden in establishing that the 1998 IEP was adequate. *Id.* at 109-110. The ALJ ordered MCPS to reimburse only one-half of Brian's private school tuition, however, based on his finding that Brian's parents sought to "obtain funding from MCPS for a predetermined decision" to send Brian to private school. *Id.* at 113-114.

The parties filed cross-appeals to the district court. The district court affirmed the ALJ's decision that the IEP was inadequate based on the reallocated burden of proof, *id.* at

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[4] MCPS appealed the district court's decision to the Fourth Circuit. But while the case was pending on appeal, the ALJ issued a subsequent decision. The Fourth Circuit vacated and remanded the district court's decision so that it could address this case in one appeal rather than in a piecemeal fashion. Pet. App. 50-53.

41, but reversed the decision to limit the reimbursement to one-half of the private school tuition. *Id.* at 47.[5]

5. The Fourth Circuit reversed. The court held that "the burden of proof is normally allocated to the party initiating the proceeding and seeking relief," *id.* at 6, and that Congress did not "depart from the normal rule" in IDEA. *Id.* at 8. The court explained that its interpretation of IDEA was consistent with the allocation of the burden of proof under federal civil rights statutes that "are silent about burden of proof," but nonetheless have been consistently interpreted to incorporate the normal rule. *Id.* The court rejected the notion that the "side with the bigger guns" must bear the burden. *Id.* at 9. As the court explained, Congress was sensitive to that policy concern and thus specified numerous "procedural safeguards for parents, but assignment of the burden of proof to school systems was not one of them." *Id.* at 15-16; *see id.* at 9-12. Moreover, placing the burden on the school systems would create a "presumption of inadequacy" at odds with IDEA's "basic policy" of "rely[ing] upon the professional expertise of local educators." *Id.* at 14.[6]

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[5] Brian's parents enrolled Brian in the McLean School for the 1998-1999 and 1999-2000 school years. In August 2000—more than two years after the initial hearing on petitioners' challenge to the 1998 IEP that is the subject of this case—MCPS convened an IEP Team to discuss Brian's educational needs for the 2000-2001 school year. This IEP placed Brian at Walter Johnson High School (Walter Johnson), an MCPS school. J.A. 17. Brian's parents transferred Brian to Walter Johnson, where he performed well academically and in sports. *See* MCPS, Walter Johnson High School 2001 Golf Results, *at* http://www.mcps.k12.md.us/schools/wjhs/athletics/golf/2001.html. Brian graduated from Walter Johnson in 2003. Petitioners assert that if MCPS had offered Walter Johnson in 1998, "this case would not be here." Pet. Br. 3. The ALJ, however, specifically found that Brian's parents were "predetermined" to send Brian to a private school in 1998. Pet. App. 113, 146-147 n.6. Moreover, Walter Johnson is a *high* school, and therefore was not an option for the IEP Team in 1998 that was considering where to place Brian for *middle* school.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the burden of proof in IDEA § 1415(f) hearings lies with the party that initiates the hearing and seeks relief, *i.e.*, petitioners here.

I. A statutory analysis of the question presented compels the conclusion that IDEA adopts the customary burden of proof—*i.e.*, the party that initiates the hearing and seeks relief bears the burden of proof. That is the default rule that applies in countless judicial as well as administrative proceedings. It is the rule that Congress adopted for administrative hearings before its own federal agencies. *See* 5 U.S.C. § 556(d). It is the rule that applies to federal civil rights laws, including Section 504 of the Rehabilitation Act of 1973, which was enacted two years before IDEA and is grounded on the same fundamental principle as IDEA. And it is the rule that Congress presumptively has in mind when it legislates. The fact that Congress did not express any intention to deviate from the customary burden of proof in IDEA itself establishes that Congress did not intend to do so.

The text of IDEA confirms that Congress adopted the normal burden of proof for IDEA hearings. The statute's reference to "due process" supports that conclusion, because this Court long ago established that it is constitutional to place the burden of proof on the party challenging government action, including the denial of vitally important benefits. *Lavine* v. *Milne*, 424 U.S. 577 (1976). The deliberate and detailed manner in which Congress *explicitly* sought to level the playing field in IDEA hearings likewise supports the conclusion that Congress did not *silently* adopt the extraordinary burden of proof urged by petitioners. That conclusion is reinforced by the fact that in a specific context covered by IDEA involving the removal of a child from the classroom for disciplinary problems, Congress—for a brief period—*did* explicitly place the burden of proof on school districts in a hearing initiated by the parents, underscoring that Congress knows how to place the burden on school districts when it wants to. The fact that IDEA explicitly puts the onus on the complainants to plead their affirmative case also supports the conclusion that Congress adopted the normal burden of proof, because the pleadings are one of the most common guides for allocating the burden of proof.

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[6] Judge Luttig dissented. *Id.* at 16-20. Based on considerations of "policy, convenience and fairness," he would have placed the burden on school districts in all IDEA hearings. *Id.* at 17.

Furthermore, IDEA may not be interpreted to impose *unstated* burdens on state and local administrators. As this Court has held, because Spending Clause programs—like IDEA—are in the nature of a "contract," the only burdens that Congress may impose on the recipients of federal funds are those that are unambiguously stated. IDEA also must be interpreted in light of the time-honored presumption of administrative regularity. Imposing the burden of proof on school districts in IDEA hearings challenging IEPs would mean that any challenged IEP is presumed *invalid* until proven otherwise by the school district—effectively subjecting the judgments of state and local educators to a presumption of *invalidity*. Finally, imposing the burden of proof on state and local educators in IDEA hearings would contravene our federalism, given that education is a traditional matter of state and local concern. Only the clearest statutory command could sanction that result.

II. To the extent the Court is inclined to take over Congress' role in weighing policy issues, the policies of the IDEA do not support reversing the ordinary burden of proof. Doing so will only foster more costly litigation in contravention of Congress' intent and at the expense of actual education. Requiring school districts to affirmatively justify every aspect of an IEP whenever it is challenged—without parents having to present any evidence—will simply encourage parents (as petitioners were found to have done here) to substitute adversarial hearings for the cooperative IEP process Congress intended. The resulting hearings will not only be more common but also more expensive, as school districts will have to anticipate and rebut in advance every conceivable objection to the IEP. The additional costs are substantial and will fall upon all other students, whose educational dollars will be spent on litigation instead. By contrast, reversing the burden will do little, if anything, for IDEA complainants, who will still have to overcome the school district's evidence regardless of where the burden is placed.

In any event, there are no informational imbalances that would warrant abrogating the customary burden of proof in IDEA cases. Parents have greater access to the most important source of information in all IDEA cases—their own child. And the comprehensive disclosure provisions of the statute ensure that parents will have ready access to all other information they may need. Petitioners' other main "policy" arguments—that school districts have greater resources and that parents are generally unsophisticated—are unrelated to the locus of the burden of proof. Regardless of their relative resources or sophistication, parents will still have to make out their case regardless of where the burden is placed. But just as important, Congress has thoroughly and expressly addressed both of these concerns. It has provided substantial assistance to parents, both by guaranteeing attorneys' fees for meritorious claims and by providing an extraordinary panoply of procedural rights to ensure that parents both understand and can meaningfully vindicate their rights. Finally, reversing the normal burden is not needed to ensure compliance given the formidable array of enforcement mechanisms that exist in both the statute and its regulations.

III. Like other Spending Clause statutes, IDEA establishes minimum federal requirements that attach to the receipt of federal funds, but permits States to adopt additional requirements that are not inconsistent with the Act.

Accordingly, it may be possible to interpret IDEA as permitting a State to voluntarily assume by statute a different burden of proof for their school districts in IDEA hearings. But that question is not presented by this case. Petitioners rely solely on federal law, and not state law. And, in any event, because Maryland has not enacted any law assigning the burden of proof to school districts in IDEA hearings, the federal rule plainly governs this case.

ARGUMENT

Like this Court's prior IDEA cases, "[t]his case presents a question of statutory interpretation." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 179 (1982); *see also Cedar Rapids Cmty. Sch. Dist.* v. *Garret F. ex rel. Charlene F.*, 526 U.S. 66, 77 (1999). The question is which party—the parents or the school district—bears the burden of proof in an administrative hearing initiated pursuant to IDEA § 1415(f). The burden of proof refers to the "burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director* v. *Greenwich Collieries*, 512 U.S. 267, 272 (1994). The assignment of that burden is "a rule of substantive law." *Id.* at 271; *see Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20-21 (2000). As explained below, although IDEA does not specifically define the burden of proof, the traditional tools of statutory construction compel the conclusion that Congress incorporated the normal rule—*i.e.*, the party that initiates the proceeding and seeks relief bears the burden of proof.

I. IDEA INCORPORATES THE CUSTOMARY RULE THAT THE PARTY INITIATING THE HEARING BEARS THE BURDEN OF PROOF

A. Congress Presumptively Legislates With The Customary Burden Of Proof In Mind

1. The "well-settled presumption" is that "Congress understands the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988). When Congress enacted the EHA in 1975—the predecessor to IDEA—it therefore understood that in civil proceedings "the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." Pet. App. 6 (citing, *e.g.*, 2 John W. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). While variously articulated, that rule has been a fixture of Anglo-American law for centuries. *See, e.g.*, *Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 653 (1980) (plurality) ("Ordinarily, it is the proponent of a rule who has the burden of proof."); *Bull* v. *United States*, 295 U.S. 247, 260 (1935) ("burden of proof" is "normally on the claimant"); *Arthur* v. *Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue.").[7]

Furthermore, when Congress enacted the EHA, it knew that it had adopted the customary burden of proof for federal administrative proceedings under the Administrative Procedure Act (APA), which was first enacted in 1946. *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); S. Doc. No. 248, at 31 (1946) ("The provision relating to the burden of proof is the standard rule"); *see also* 2 Laura H. Dietz, *et al.*, Am. Jur. 2d *Admin. Law* § 354 (2004). As this Court recognized in *Greenwich Collieries*, 512 U.S. at 281, this means that in any administrative hearing covered by the APA, "when the evidence is evenly balanced, the benefits claimant must lose." Thus, the default rule when Congress enacted IDEA was that a claimant bears the burden of proof in challenging the decisions of federal administrative officials. As explained below, under the principles governing the interpretation of Spending Clause legislation such as IDEA, Congress cannot be presumed to have silently imposed a greater burden on state and local educational agencies under IDEA. *See* Part I.C, *infra*.

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[7] The authorities recognizing this rule are legion. To cite only a few: *Sadeghi* v. *INS*, 40 F.3d 1139, 1143 (10th Cir. 1994) ("general rule [is] that the petitioner bears the burden of proof"); *Rockwell* v. *Commissioner*, 512 F.2d 882, 887 (9th Cir. 1975) ("In most litigation, from time immemorial, the burden of proof * * * is on the plaintiff."); *People* v. *Orth*, 530 N.E.2d 210, 215 (Ill. 1988) ("party requesting judicial relief bears the burden of proof"); *Lublin* v. *Central Islip Psychiatric Ctr.*, 372 N.E.2d 307, 310 (N.Y. 1977) ("burden of proof is normally placed upon the party who is seeking affirmative relief"); 21 Charles A. Wright, *et al.*, Fed. Prac. & Proc. Evid. § 5122 (1997) ("[T]he usual rule is that the burden of proof is on the plaintiff."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 63, at 314 (2d ed. 1994) ("the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims"); 1 Byrun K. Elliot & William F. Elliot, *A Treatise on the Law of Evidence* § 132 (1904) ("party who seeks to move a court in his favor" normally bears the burden of proof); Thomas Starkie, *Starkie on Evidence* 533 (George Sharswood ed., 8th Am. ed. 1860) ("general rule" is "that the party who alleges the affirmative of any proposition shall prove it").

In the government context, the customary rule gives effect to the time-honored presumption of administrative regularity, *i.e.*, the assumption that administrators perform their duties properly and in good faith. *See United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) ("courts presume that [public officers] have properly discharged their official duties") (quoting *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)). Indeed, as this Court has recognized, the traditional presumption of regularity is intertwined with the allocation of the burden of proof in a proceeding challenging administrative action. *See Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350, 353 (1918) ("The good faith of such [state] officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.").

2. The customary rule applies in countless contexts that involve claims of entitlement to government benefits or privileges of vital importance to millions, especially those who seek relief predicated on a claim that they were improperly denied a statutory right or benefit. For example, at the federal level, the complainant bears the burden of proof in challenging the denial of benefits under the Black Lung Benefits Act, *Greenwich Collieries*, 512 U.S. at 270; Federal Employees Health Benefits Act, *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000); Longshore and Harbor Workers' Compensation Act, *Greenwich Collieries*, 512 U.S. at 270; Public Safety Officers' Benefits Act, *Bice* v. *United States*, 61 Fed. Cl. 420, 436 (2004); Radiation Exposure Compensation Act, *Howell* v. *Reno*, 939 F. Supp. 802, 806 (D. Colo. 1996); and Social Security Act, *Brown* v. *Apfel*, 192 F.3d 492, 499 (5th Cir. 1999). These benefits are at least as important to the claimant as services sought under IDEA, such as the class-size reduction sought by the petitioners here.[8]

Likewise, at the state or local level, the claimant typically bears the burden of proof in challenging the denial or loss of privileges ranging from public employment to vital benefits.[9] So too, individuals bear the burden of proof in challenging tax assessments, *Long* v. *Wayne Twp. Assessor*, 821 N.E.2d

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[8] Petitioners erroneously suggest that the burden of proof is on the agency in a claim for social security benefits. Pet. Br. 43. Although the burden of production may shift in such an action, the burden of *persuasion* remains on the claimant at all times. *See, e.g.*, *Kerner* v. *Flemming*, 283 F.2d 916, 922-923 (2d Cir. 1960).

[9] *See Weibel* v. *Midwest Doors of Kansas*, 2005 WL 331820, at *2 (Kan. Ct. App. Feb. 11, 2005) (workers' compensation); *Velasquez* v. *Department of Higher Educ.*, 93 P.3d 540, 542-544 (Colo. Ct. App. 2004) (employment); *Scott* v. *Iowa Dep't of Transp.*, 604 N.W.2d 617, 620-621 (Iowa 2000) (driver's licenses); *In re Retirement Benefits*, 554 N.W.2d 85, 88 (Minn. Ct. App. 1996) (pension benefits); *Iwanski* v. *Streamwood Police Pension Bd.*, 596 N.E.2d 691, 694 (Ill. App. Ct. 1992) (disability benefits).

466, 468 (Ind. Tax Ct. 2005), the issuance of environmental permits, *Montana Envtl. Info. Ctr.* v. *Montana Dep't of Envtl. Quality*, 2005 WL 896282, at *3 (Mont. Apr. 19, 2005), and the condemnation of their own land, *Owens* v. *Brownlie*, 610 N.W.2d 860, 866 (Iowa 2000). Maryland, the State from which this case arises, has long followed the default rule in its own administrative proceedings. *See Bernstein* v. *Real Estate Comm'n,* 156 A.2d 657, 662 (Md. 1959) ("[T]he burden of proof is generally on the party asserting the affirmative of an issue before an administrative body.").

The customary rule is already a settled feature in the public school context as well. For example, when a student has been expelled from school or suspended, the student or his parents typically bears the burden of proof in an action brought to challenge that expulsion. *See, e.g., Fuller* v. *Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 81*, 78 F. Supp. 2d 812, 821 (C.D. Ill. 2000), *aff'd*, 251 F.3d 662 (7th Cir. 2001); *Cross County Sch. Dist.* v. *Spencer*, 58 S.W.3d 406, 408 (Ark. Ct. App. 2001); *Mayberry* v. *Board of Educ. of Anne Arundel County*, 750 A.2d 677, 686-687 (Md. Ct. Spec. App. 2000); *West* v. *Board of Trs. of Miami Univ. & Miami Normal Sch.*, 181 N.E. 144, 148 (Ohio Ct. App. 1931). A parent's interest in ensuring that their child is not wrongfully *expelled* from the classroom is at least equivalent if not greater than a parent's interest in ensuring that the child receives a different school or particular class size under an IEP.

3. Federal civil rights laws also invariably incorporate the traditional rule. For example, the complainant bears the burden of proof in actions under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See Kinsella* v. *Rumsfeld*, 320 F.3d 309, 314 (2d Cir. 2003); *Gribcheck* v. *Runyon*, 245 F.3d 547, 550 (6th Cir. 2001). That is significant because the EHA and Section 504—which were enacted only two years apart—"are built around fundamental notions of equal access to state programs" and thus "have been interpreted to be strikingly similar." *Smith* v. *Robinson*, 468 U.S. 992, 1016-17 (1984).

The plaintiff also bears the burden of proof under the Americans with Disabilities Act (ADA), *see Tyler* v. *Ispat Inland Inc.*, 245 F.3d 969, 972 (7th Cir. 2001); Age Discrimination in Employment Act, *see Mayer* v. *Nextel West Corp.*, 318 F.3d 803, 807 (8th Cir. 2003); Family Medical Leave Act, *see King* v. *Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir. 1999); and Title VII of the Civil Rights Act, *see St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507 (1993). As the court of appeals observed, "[l]ike the IDEA, these statutes are silent about the burden of proof, yet we assign it to the plaintiff who seeks the statutory protection or benefit." Pet. App. 8-9.[10]

Petitioners argue that these civil rights statutes "differ from IDEA in that they do not impose affirmative obligations." Pet. Br. 31. That argument is without merit. In virtually every situation discussed above involving statutory benefits or privileges, the government has an affirmative obligation to provide those benefits to eligible individuals. Yet the customary rule is that the claimant bears the burden of proof in challenging the denial of such benefits or privileges. Moreover, as petitioners themselves acknowledge (Br. 32), the ADA imposes an affirmative obligation to make reasonable accommodations for the disabled, *see Tennessee* v. *Lane*, 541 U.S. 509, 516 (2004), as does Section 504 of the Rehabilitation Act, *Henrietta D.* v. *Bloomberg*, 331 F.3d 261, 265, 272 (2d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004). Petitioners' novel "affirmative obligation" rationale accordingly provides no basis for concluding that Congress departed from the normal burden of proof in IDEA.

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[10] These statutes are subject to the "*McDonnell Douglass*" framework—which petitioners have never argued is applicable under IDEA—for shifting the burden of *production* in certain instances. Under that framework, however, the burden of *persuasion* " 'remains at all times with the plaintiff.' " *St. Mary's Honor Ctr.*, 509 U.S. at 507 (quoting *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981)).

Tellingly, petitioners have not identified a single analogous instance in which the party that initiates the proceeding and seeks relief is relieved of the burden of proof. That includes *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973). In *Keyes*, the Court held that where "school authorities have been found to have practiced purposeful segregation in part of a school system"—*i.e.*, *de jure* discrimination in violation of the Fourteenth Amendment—the burden of proof shifts to the school district to show that it has not engaged in such *de jure* discrimination in other segregated schools in the same system. *Id.* at 209. Even in that extraordinary context, however, the customary burden of proof is not inapplicable. Rather, the Court simply held that the burden of proof *shifts* to school authorities if—but only if—there is "a finding of intentionally segregative school board actions in a meaningful portion of a school system." *Id.* at 208. This case, like the typical IDEA action, involves a *claim* that the school district's IEP is inadequate—unaccompanied by any prior judicial finding that the school district has deliberately violated its obligations under IDEA, much less a finding that the district deliberately violated the Fourteenth Amendment. It is absurd to suggest that *Keyes* has any application here.[11]

4. When Congress wants to depart from the customary burden of proof, it knows how to. For example, although the default rule is that a claimant bears the burden of proof in administrative hearings challenging the denial of benefits, Congress has specified a different rule for veteran's benefits. *See* 38 U.S.C. § 5107; *see also*, *e.g.*, 8 U.S.C. § 1186b(c)(3)(D); 25 U.S.C. § 450j-1(*l*)(2). Accordingly, the fact that Congress did not expressly deviate from the customary rule in IDEA is itself a compelling if not decisive reason to conclude that Congress did not intend to do so. *See Industrial Union*, 448 U.S. at 653 (the fact that Congress did not express a different rule "indicates that it intended the Agency to bear the normal burden of establishing the need for the proposed standard"); *see also Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. at 20-21 (because Bankruptcy Code "makes no provision for altering the [settled burden of proof under state law for tax claims]," "its silence says that no change was intended"); *Bryant Woods Inn, Inc.* v. *Howard County*, 124 F.3d 597, 603-604 (4th Cir. 1997) (because text of the Fair Housing Act "evidences no intent to alter normal burdens," burden of proof is on the plaintiff).[12]

At a minimum, however, given that the default rule against which Congress legislated when it passed IDEA was that a claimant bears the burden of proof, petitioners must point to concrete evidence—not simply abstract conceptions of "policy and fairness"—demonstrating that Congress intended to depart from that rule. Neither petitioners nor their amici have identified any such evidence. To the contrary, as explained next, an examination of the text and history of IDEA only bolsters the conclusion that Congress intended to incorporate the normal burden in IDEA hearings.

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[11] The reliance (Br. 25) by amici Arc of the United States *et al.*, on Section 5 of the Voting Rights Act of 1965 is similarly far-fetched. Section 5 is an extraordinary federal law that requires specified States—found to have discriminated on the basis of race—to obtain pre-clearance from the federal government before adopting new voting practices. 42 U.S.C. § 1973c. "The very effect of § 5 was to shift the burden of proof [for covered states] with respect to racial discrimination in voting." *Georgia* v. *United States*, 411 U.S. 526, 538 n.9 (1973). IDEA by no means is patterned on Section 5 and has no "pre-clearance" requirement.

[12] *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461 (2004), is not to the contrary. In that case, the Court stated that EPA could not avoid the burden of proof that it would bear—under the customary rule—in an "EPA-initiated civil action" by pursuing an alternative "enforcement route" in challenging the same state environmental determination. *Id.* at 493-494. The Court's decision simply closed a loophole in a unique administrative circumstance with no similarity to IDEA.

B. IDEA Itself Confirms That Congress Incorporated The Customary Burden Of Proof

The text of IDEA and recent amendments to the Act—including the Act's reference to "due process hearings"—confirm that Congress intended the customary burden of proof to apply in administrative hearings under § 1415(f).

1. In arguing that Congress intended to depart in IDEA from the customary rule, petitioners rely exclusively on § 1415(f)'s requirement of "an impartial due process hearing." 20 U.S.C. § 1415(f)(1)(A). Petitioners argue that "an analysis of due process principles dictates that the burden be placed on the school district." Pet. Br. 20; *see id.* at 22-28. We agree that Congress' use of the term "due process" evinces an intent to require procedures that comport with due process. The elaborate procedural safeguards established by IDEA, discussed below, guarantee that claimants receive more than adequate process. Indeed, few federal statutes can match the express procedural protections conferred by IDEA. But the statute's reference to "due process" by no means suggests that Congress silently flipped the customary burden onto schools. This Court long ago settled that it is constitutional to place the burden on the party challenging the legality of government action, including when it comes to a claim that an individual has been denied a vitally important government benefit. *Lavine* v. *Milne*, 424 U.S. 577 (1976).

In *Lavine*—which was decided less than two weeks after *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—the Court unanimously rejected a due process challenge to a state law that placed the burden of proof on individuals claiming that they had been erroneously denied welfare benefits. The Court recognized that "[w]here the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of litigation," but stressed that, "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 585. In rejecting the due process challenge in *Lavine*, the Court noted that if an adverse determination is made, the applicant has the right "to receive a full hearing," and that any "wrongful decision that is successfully appealed gains the State no substantive advantage and, indeed, costs the State by way of procedural waste." *Id.* at 586-587. The same is true under IDEA, where claimants may pursue administrative as well as judicial challenges to IEPs. 20 U.S.C. § 1415(f)(1)(A), (i)(2).[13]

Although petitioners do not acknowledge *Lavine*, they argue that the interests at stake in a hearing challenging the adequacy of an IEP mandate the adoption of a different constitutional rule. That argument is refuted by the longstanding tradition of allocating the burden of proof on claimants in administrative hearings governing the denial or revocation of numerous potentially life-altering government benefits or privileges. *See supra* at 17-18. Indeed, petitioners' expansive due process rationale would cast doubt on the constitutionality of thousands of administrative hearings conducted at the federal and state level, not to mention the APA itself. In any event, as discussed in Part II below, the policy considerations in which petitioners couch their due process argument are overstated and unavailing.

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[13] Lower courts have repeatedly relied on *Lavine* in rejecting due process challenges to the allocation of the burden of proof on claimants. *United States* v. *Property, Parcel of Defendant Francisco Aguilar*, 337 F.3d 225, 233 (2d Cir. 2003); *United States* v. *$250,000 in U.S. Currency*, 808 F.2d 895, 900 & n.18 (1st Cir. 1987); *Saavedra* v. *City of Albuquerque*, 917 F. Supp. 760, 765 (D.N.M. 1994), *aff'd*, 73 F.3d 1525 (10th Cir. 1996); *Drogolewicz* v. *Quern*, 393 N.E.2d 1212, 1216 (Ill. App. Ct. 1979); *Sherris* v. *City of Portland*, 599 P.2d 1188, 1193 (Or. Ct. App. 1979). Nothing in *Cooper* v. *Oklahoma*, 517 U.S. 348, 363 (1996), on which petitioners rely (Br. 26), undercuts *Lavine*. *Cooper* arose in the context of a *criminal* trial, where, as *Lavine* itself stressed, the "standard rule [is] that the State *does* bear the burden of proving criminal guilt." *Lavine*, 424 U.S. at 585 n.10.

Because the normal burden of proof comports with due process, IDEA's reference to "due process" is further confirmation that Congress intended to incorporate the customary burden of proof in IDEA administrative hearings.

2. The conclusion that Congress adopted the customary burden of proof is buttressed by other facets of IDEA. The deliberate and detailed manner in which Congress sought to level the playing field in IDEA hearings fatally undermines the notion that Congress silently imposed the extraordinary burden urged by petitioners. As this Court has put it, to address the concern that "school officials would have a natural advantage" over parents, "Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *School Comm. of Town of Burlington* v. *Department of Educ.*, 471 U.S. 359, 368 (1985); *see also Rowley*, 458 U.S. at 205 (discussing "elaborate and highly specific procedural safeguards embodied in § 1415"). If Congress had intended to add petitioners' proposed burden of proof to the list of those safeguards, it would have done so expressly.

For example, Congress gave the parents of children with disabilities the right to examine and copy educational records relating to their child, and to demand an explanation of such records from school authorities. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.562. It gave parents the right to participate in meetings relating to the "identification, evaluation, and educational placement of the child," and the development of IEPs. 20 U.S.C. § 1415(b)(1), (d). It gave parents the right to obtain an independent evaluation of their child at the school district's expense. 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(2)(ii). And it obligated school districts to give parents written notice at key periodic intervals containing "a full explanation of the procedural safeguards" guaranteed to them under the Act. 20 U.S.C. § 1415(d)(2).

Congress granted parents an additional set of safeguards and services for situations in which disagreements do arise. For example, parents may seek voluntary mediation conducted by an impartial mediator at the school district's expense, 20 U.S.C. § 1415(e), or a "due process" hearing before an impartial hearing officer. 20 U.S.C. § 1415(f)(1). Before the hearing, school districts must convene an informal meeting with the parents and members of the IEP Team to discuss the complaint. 20 U.S.C. § 1415(f)(1)(B)(i). In addition, at least five days before the hearing, the parties are required to disclose all evaluations and recommendations that they intend to use at the hearing. 20 U.S.C. § 1415(f)(2)(A). Congress also established specific "safeguards" for the hearing itself, including the right to have counsel present, to call and confront witnesses, to a hearing on the record, and to findings of fact and a decision. 20 U.S.C. § 1415(h). It gave parents who did not prevail in such a hearing the right to file an administrative appeal or civil action. 20 U.S.C. § 1415(i)(1), (2). And it gave prevailing parents the right to reasonable attorney's fees. 20 U.S.C. § 1415(i)(3)(B).

Given the exceptional care that Congress took in detailing the "safeguards" that it deemed appropriate for IDEA, the omission of any provision stating that school districts bear the burden of proof in any hearing initiated by parents is a red flag that Congress did not intend to add that burden to the list of safeguards explicitly conferred by IDEA.[14]

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[14] For similar reasons, petitioners' reliance (Br. 27) on *Pennsylvania Association for Retarded Children* v. *Pennsylvania (PARC)*, 343 F. Supp. 279 (E.D. Pa. 1972), and *Mills* v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), is misplaced. As the court of appeals explained, although "Congress took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into [IDEA]," neither case authorizes a court to write *additional* standards into IDEA. Pet. App. 13. That is particularly true with respect to the burden of proof. In both *PARC* and *Mills*, the school defendants had acknowledged that they had failed to

3. Still more evidence is the manner in which Congress addressed the situation in which a disabled child is subject to disciplinary action that necessitates a change in the child's educational placement under IDEA. In that particular context, Congress *did* expressly assign the burden of proof to school districts in certain hearings initiated by parents.

IDEA contains a "stay put" provision that provides that, unless the parents and school district otherwise agree, a child should remain in the "then-current educational placement of the child" during proceedings conducted under the Act. 20 U.S.C. § 1415(j). The Act creates an exception to the stay-put rule, however, in certain situations in which a school district determines that a temporary or longer-term change in a child's educational placement is necessary because the child has violated applicable rules or presents a risk of injury to other students, and the school district has determined that the child's actions were not a manifestation of a disability. *See* 20 U.S.C. § 1415(k)(1). A parent may initiate a due process hearing to challenge a school district's change in the child's placement or manifestation determination.

In the 1997 amendments to IDEA, Congress added a provision stating that, in reviewing a school district's manifestation determination in a hearing initiated by the parents to challenge that determination, "the hearing officer shall determine whether *the public agency has demonstrated* that the child's behavior was not a manifestation of such child's disability." 20 U.S.C. § 1415(k)(6)(B)(i) (1997) (emphasis added); *see also* 20 U.S.C. § 1415(k)(2)(A) (1997). In that situation, Congress *did* depart from the normal rule by specifying that the school district bore the burden of demonstrating that its manifestation determination was correct, even when the parents initiated the hearing. Congress eliminated that express burden in the 2004 amendments to IDEA. *See* 20 U.S.C. § 1415(k)(3) (hearings as to manifestation and alternative-placement determinations). But this history proves that Congress knows how to place the burden of proof on the school district when Congress wants to—and thus bolsters the conclusion that Congress did not *silently* override the customary rule in any administrative hearing in which it did not expressly place the burden on the school district.

4. IDEA's rule that puts the onus on the complainant to plead its affirmative case also comports with the customary burden of proof. Although the administrative hearing at issue in this case was initiated by the parents, IDEA expressly recognizes that *either* "the parents *or* the local educational agency" may initiate a "due process hearing." 20 U.S.C. § 1415(f)(1)(A) (emphasis added); *see also* 20 U.S.C. § 1415(b)(7)(A), (c)(2). Such hearings may be requested, for example, when a disagreement arises over the need for or adequacy of an IEP, change of placement due to an education or disciplinary issue, whether a child's misbehavior or violation of school rules is a manifestation of his disability, or the provision of related support services. There are many reasons why either parents or the school district might initiate a hearing in these varying situations or others.

Before either party may obtain a due process hearing, however, the initiating party must file a "due process complaint notice" with respect to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6)(A). Among other things, the complaint must identify (1) the child and relevant school, (2) "the nature of the problem" and "facts relating to

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provide adequate educational services. *See Mills*, 348 F. Supp. at 871; *PARC*, 343 F. Supp. at 301-302. The burden of proof was not at issue in either case. Neither case supports a blanket rule that imposes the burden of proof on school districts where, as here, the school district has not been found to have engaged in unlawful discrimination and placed under a court-approved stipulation or order. More to the point, if Congress had intended to adopt the burden of proof specified in the joint stipulation in *Mills* or the decree in *PARC*, it would have done so expressly.

the problem," and (3) "a proposed resolution of the problem." 20 U.S.C. § 1415(b)(7)(A)(ii)(I), (III), (IV). No party may have a "due process hearing" until it complies with the Act's pleading requirement, 20 U.S.C. § 1415(b)(7)(B), and the hearing is limited to issues raised in the complaint, 20 U.S.C. § 1415(f)(3)(B). The Act also requires the "non-complaining party" to file a written response within 10 days of receiving the complaint addressing the issues raised in the complaint. 20 U.S.C. § 1415(c)(2)(B)(i), (ii).[15]

The Act's pleading requirements are telling. As one leading authority has explained: "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. The pleadings therefore provide the common guide for apportioning the burdens of proof." 2 *McCormick on Evidence* § 337 (footnote omitted). *See also* 11 Charles F. Chamberlayne, *A Treatise on the Modern Law of Evidence* § 943 (1911) ("Whichever, of the parties, has the affirmative of the issue as determined by the pleadings, has the burden of proof, to establish his contention by the legally required preponderance of the evidence."). That IDEA places the "burden of pleading" on complainants—including parents—is still further confirmation that Congress intended the complainants to bear the burden of proof under IDEA.

C. IDEA Cannot Be Interpreted To Impose Unstated Burdens On State And Local Administrators

IDEA must be construed in the light of several fundamental background principles that this Court has recognized. Those principles prevent the courts from imposing unstated burdens on state and local school authorities that implement IDEA.

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[15] The response provision was added by the 2004 amendments. Before 2004, the notice-pleading requirement was explicitly placed only on parents who initiated a due process hearing. *See* 20 U.S.C. § 1415(b)(7)(B), (f) (1997).

1. IDEA is Spending Clause legislation that conditions federal financial assistance for special education on compliance with the Act's requirements. *See Rowley*, 458 U.S. at 190 n.11, 204 n.26; *see also Cedar Rapids*, 526 U.S. at 83-84 (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"); H.R. Rep. No. 105-95, at 135 (1997) (IDEA "is within the powers of Congress under the spending clause"). In particular, IDEA conditions the receipt of funding on the requirement that states afford "[c]hildren with disabilities and their parents * * * the procedural safeguards required by section [1415]." 20 U.S.C. § 1412(a)(6)(A).

As this Court has stressed, because Spending Clause programs are in the nature of a "contract," " 'if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.' " *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)). There certainly is no "unambiguous" statement in IDEA that one of the strings attached to IDEA funding is that a State's school districts must bear the burden of proof in all hearings in which parents demand additional services. Adopting that exceptional burden—"a rule of substantive law," *Greenwich Collieries*, 512 U.S. at 271—would alter the terms of the contract agreed to by states. Moreover, placing that burden on the states would add to what is an already vastly underfunded mandate, with Congress funding less than 10 percent of the burdens that the statute expressly imposes. *See supra* n.3.[16]

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[16] Each year a State seeking IDEA funding must submit a plan to the Secretary of Education containing assurances that, among other things, the State has adopted "policies and procedures" that ensure that IDEA § 1415's "procedural safeguards" are met. 20 U.S.C. § 1412(a)(6)(A). To our knowledge, the Secretary of Education has never denied eligibility to a State seeking IDEA funding on the ground that it applied the normal burden of proof in

2. IDEA also must be construed in light of the presumption of regularity that attaches to administrative decision-making. *See* Part I.A, *supra*. That presumption is particularly strong with respect to the judgments of state and local educators concerning the appropriate educational services for a child. *See Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) ("By and large, public education in our Nation is committed to the control of state and local authorities.") (quotation omitted); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that * * * school officials will act in good faith."). Ultimately, the "local educational agency"—*i.e.*, the school district, *see* 20 U.S.C. § 1401(19)—is responsible for producing the IEP and periodically reviewing and revising it as appropriate. *See* 20 U.S.C. § 1414(d)(2), (d)(4)(A). The school district's judgment that an IEP is appropriate for a child is entitled to the same presumption of regularity as other federal or state administrative acts.

Petitioners ask this Court to infer that Congress turned the settled presumption on its head without a word in the statute remotely directing such a drastic step. If school districts bear the burden of proof in hearings brought by parents to challenge an IEP, then whenever the evidence is in equipoise the school district will lose and the IEP will be thrown out. More fundamentally, the moment that a complaint is filed, an IEP is presumptively invalid—regardless of whether the parents present any evidence in support of their complaint—unless the school district can establish to the satisfaction of an ALJ that the plan is valid. In other words, as the court of appeals observed, petitioners' position is that Congress adopted a presumption of administrative *irregularity*. *See* Pet. App. 14 ("We believe that when parents challenge the adequacy of an IEP, they should lose if no evidence is presented. To say that the school system should lose is to say that every challenged IEP is presumptively inadequate."). Nothing in IDEA sanctions that extraordinary result.

3. The presumption of administrative regularity is particularly important when Congress legislates in a sensitive area where state and local administrators have traditionally played a vital role, such as the education of the Nation's youth. *See United States* v. *Lopez*, 514 U.S. 549, 580-581 (1995) ("[I]t is well established that education is a traditional concern of the States."); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991); *see also Milliken* v. *Bradley*, 418 U.S. 717, 741-742 (1974) ("[L]ocal autonomy has long been thought essential * * * to quality of the educational process."). Under bedrock principles of federalism, Congress does not silently alter the normal burdens on state and local governments carrying out such traditional state functions. *See Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991); *see also Cedar Rapids*, 526 U.S. at 84 (Thomas, J., joined by Kennedy, J., dissenting) (discussing "federalism concerns" in construing IDEA). In enacting IDEA, Congress gave no indication—much less any clear expression—that it intended to upset the traditional respect accorded to the judgments of state and local officials on education matters by requiring educators to bear the burden of proof in any hearing challenging the adequacy of their judgments in adopting an IDEA.

To the contrary, in addition to the deference traditionally accorded the decisions of teachers and school officials, IDEA reaffirms that state and local educators are responsible for educating children with disabilities—and making the judgments necessary to achieve that objective. *See* 20 U.S.C. § 1400(c)(6); *see* 20 U.S.C. § 1400(d)(1)(C). As this Court observed in *Rowley*, "Congress' intention was not that [IDEA] displace the primacy of the States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped." 458 U.S. at 208; *see also id.* at 206 (IDEA does not permit "the courts to substitute their own notions of sound

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administrative hearings initiated by parents. Certainly, Maryland has never been denied federal assistance under IDEA on that basis.

educational policy for those of the school authorities which they review"); *M.M.* v. *School Dist. of Greenville Cty.*, 303 F.3d 523, 532 (4th Cir. 2002) ("We have always been and we should continue to be reluctant to second-guess professional educators."). To be sure, IDEA imposes requirements on States that choose to accept federal assistance under the Act. But construing IDEA to impose—through silence, no less—a burden on school districts to affirmatively justify any IEP subject to a complaint would upset the traditional balance of federal and state authority in matters of education, not to mention the balance expressly struck by Congress in IDEA.

The federalism concerns are heightened by the manner in which Congress has dealt with federal agencies. As discussed above, Congress has applied the customary burden of proof to federal administrative hearings. *See* 5 U.S.C. § 556(d); *supra* at 16. It would turn federalism on its head to presume that Congress silently intended to place *greater* burdens on States carrying out federal mandates under Spending Clause legislation than Congress placed on its own agencies. Yet that is the necessary conclusion of petitioners' position.

II. THE POLICIES OF IDEA DO NOT SUPPORT PETITIONERS' REQUEST TO ABROGATE THE NORMAL BURDEN OF PROOF

As shown, a statutory analysis of the question presented leads to the conclusion that Congress intended the customary burden of proof to apply in administrative hearings under IDEA. That is as far as the Court need go to decide this case, because vague policy concerns cannot supply a congressional intent that is neither explicitly nor implicitly expressed in the statutory language. Indeed, accepting petitioners' invitation to alter the normal burden based on abstract arguments about which rule might be "fairer" would invite litigation over that question in virtually any statute that does not expressly specify a burden. But even if the Court were inclined to engage in its own weighing of policy issues, the policies of IDEA do not support altering the normal burden of proof.

A. Requiring School Districts To Affirmatively Justify All Aspects Of A Challenged IEP Would Foster Costly Litigation In Violation Of Congress' Intent

It is important to understand that altering the normal burden of proof will have far greater consequences for school districts beyond simply supplying a rule of decision for those cases where the evidence is in equipoise. Reversing the burden would require every school district to affirmatively justify, though expert testimony or other evidence, every aspect of an IEP whenever it is challenged even in the most general terms. It would also encourage parents—as petitioners were found to have done here—to make only "mock effort[s]" to cooperate in the IEP process, Pet. App. 146 n.6, and instead force adversarial litigation.

If the school district bears the affirmative burden of proof whenever a complaint is filed, the school district must—without any prior evidentiary showing by the complainants—formulate and present competent evidence rebutting in advance every conceivable objection that could be raised under the generalized language of the complaint. Thus, a school district would have to prepare evidence covering every conceivable issue (and then some) for if it does not anticipate that a complainant would raise a specific point and therefore does not present evidence on that point, it would lose the case. That can be an extremely difficult endeavor, if not an impossible one in some cases, given the generalized FAPE duty established by IDEA—which is designed to give flexibility to educators, not to make defending their decisions more difficult in court. *See Rowley*, 458 U.S. at 192, 203.

In this case, for example, petitioners' complaint stated that the issue was whether the proposed placement was "appropriate." J.A. 12. The complaint alleges very generally that the Hoover placement "is too large, not structured enough, has insufficient services and does not include required related services," that petitioners were "in disagreement with the Intensity of service proposed," and that "we do not believe MCPS has identified Brian's complete disability." J.A. 12-13. Although that complaint was filed pursuant to the then-existing IDEA, the amended version requires complainants simply to "descri[be] the nature of the problem of the child * * * including facts relating to such problem" and "a proposed resolution of the problem to the extent known and available to the party at the time." 20 U.S.C. § 1415(b)(7)(A)(ii)(III), (IV). Thus, if it bore the burden of proof, MCPS would have to present expert testimony or other evidence showing that the proposed placement was not "too large," was sufficiently "structured," and provided appropriate "[i]ntensity." MCPS would also have to show that it identified "Brian's complete disability."

Not only does this backwards procedure unnecessarily multiply the costs and burdens on schools—at the expense of actual education—but it also contravenes Congress' goal of resolving IEP disputes without costly litigation. Due process hearings are intended to be a last resort for dissatisfied parties to raise specific challenges only when the collaborative IEP and mediation process has failed to resolve particular disagreements. In particular, the 2004 amendments contain several provisions designed to "[r]estor[e] trust and reduce[e] litigation" under IDEA. H.R. Rep. No. 108-77, at 85 (2003).[17] In making those changes, Congress sought to alleviate the burdens imposed on school districts by "excessive litigation under the Act," and to "align the Act" with other federal statutes such as those authorizing "civil rights claims, Federal tort claims, [and] Social Security." *Id.* at 116.[18]

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[17] *See, e.g.*, 20 U.S.C. § 1415(b)(7)(A) (notice requirements for complaints); 20 U.S.C. § 1415(b)(6)(B) (statute of limitations); 20 U.S.C. § 1415(e) (mediation and nonbinding arbitration); 20 U.S.C. § 1415(i)(3)(B) (attorney's fees for frivolous claims); H.R. Rep. No. 108-77, at 85-86 (discussing new provisions).

[18] *See also id.* at 85 ("litigation breeds an attitude of distrust between the parents and the school personnel rather than working cooperatively to find the best education placement and services for the child"); *id.* at 113 ("[M]ediation under the Act has resulted in significant reduction in litigation and helped in restoring trust between parents and school personnel."); S. Rep. No. 108-185, at 6 (2003) (The 2004 amendments seek to discourage "an adversarial, rather than cooperative, atmosphere"). The 2004 amendments build on several reforms initiated by the 1997 amendments to IDEA, including the voluntary mediation provision, which were designed to avoid "formal due process and litigation * * * when possible." H.R. Rep. No. 105-95, at 106; S. Rep. No. 105-17, at 26-27 (1997) (same).

Interpreting IDEA to impose a burden of proof on school districts in any hearing initiated by a parent would *increase* the incentive for litigation over IEPs and *differentiate* IDEA from other federal civil rights statutes and benefits laws, which, as discussed above, incorporate the customary burden of proof. Flipping the burden creates strong incentives for parents not to cooperate beforehand, knowing that the school will in any event have to come forward in a subsequent hearing and justify each and every aspect of the IEP. With tens of thousands of dollars in private school tuition and hundreds of thousands in attorneys' fees potentially on the line, parents and their attorneys will be encouraged to take more and more matters to hearings because only the school district will bear the affirmative burden if forced to litigate.

The facts of this case amply illustrate the dangers. The ALJ found that Brian's parents, rather than cooperating in the IEP process, sought to use IDEA to compel MCPS to subsidize their "predetermined" decision to have Brian attend an expensive private school. Pet. App. 113, 146-147 n.6. Noting that they had enrolled Brian at McLean before even beginning the IEP process, the ALJ expressly found that the parents' participation in the IEP meeting was only a "mock effort," *Id.* at 146 n.6, and that it was "more likely than not that [Brian] would be attending the McLean School * * * no matter what IEP was developed and public school placement was offered." *Id.* at 113, 147 n.6. As the ALJ noted, the parents "did not approach their interaction with MCPS as a partnership in educating [Brian] as a student with disabilities," which was "inconsistent with the congressional intent behind the statute." *Id.* at 114, 147 n.6.[19]

This kind of gamesmanship only will be encouraged if the normal burden of proof is reversed in all cases. *Cf. Rowley*, 458 U.S. at 209 ("parents and guardians will not lack ardor" in taking advantage of IDEA benefits). There is far less incentive for any parents to cooperate in developing an IEP if they know that the school district will always have to justify, in a subsequent hearing, each and every aspect of the plan—without the parents even having to present a shred of evidence first. Abrogating the burden of proof would simply encourage litigious parents to snub the intended IEP process, or turn it into a dry run or fishing expedition for adjudication. Congress did not intend for adversarial hearings to supplant the cooperative IEP and mediation process, yet that is what will happen if the ordinary burden of proof is reversed.

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[19] It is particularly important to respect the ordinary burden of proof when, as in this case, parents initiate the IDEA hearing to demand that a public school to pay tens of thousands of dollars in private school tuition. *See generally* Cindy L. Skaruppa, *et al.*, *Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?*, 114 Ed. Law Rep. 353 (1997). The McLean School, where Brian was unilaterally enrolled, charges over $21,000 per year for high school tuition. *See* McLean School, *Admission, Tuition & Fees*, *at* http://www.mcleanschool.org. Far greater amounts are possible. Debra Nussbaum, *Reining in Special Education*, New York Times, Aug. 31, 2003 (private placements in New Jersey range from $20,000 to $100,000); Lisa Gubernick and Michelle Conlin, *The Special Education Scandal*, Forbes, Feb. 10, 1997 (schools forced to pay annual tuition expenses of $80,000 and $193,000).

B. Abrogating The Normal Burden Of Proof Would Multiply The Burdens On School Districts At The Expense Of Education For All Students

Contrary to the image painted by petitioners and their amici, shifting the burden of proof in IDEA hearings will affect more than just the parties to a particular proceeding. The resources of school districts—many of which are relatively small entities—are far from limitless, and every dollar that must be devoted to litigation is a dollar that cannot be spent on actual education. The unnecessary costs that would be imposed on school districts by petitioners' rule, when multiplied across the tens of thousands of IDEA hearings instituted nationwide, would deny educational services to far more children than could ever conceivably benefit from the rule. If such costs are to be borne by all schools, they should be imposed by Congress, not this Court.

As noted, disrupting the normal burden of proof would require schools to affirmatively justify, through expert testimony or other competent evidence, every conceivable aspect of an IEP that a complainant could challenge, lest the schools run the risk of having failed to carry their burden. As Congress recognized when it encouraged informal mediation, IDEA hearings are already costly affairs even in ordinary circumstances. The first hearing in this case, for example, lasted for three days, and MCPS presented six witnesses just to respond to the parents' evidence. *See* Pet. App. 123.

Nationwide, the costs of IDEA compliance, including litigation, are enormous. The Nation's schools spent $78 billion to educate special education students in 1999-2000—comprising 21.4 percent of total spending for elementary and secondary education—and the costs of educating those students are nearly double those of other students. *See* U.S. Dep't of Educ., *Twenty-fourth Annual Report to Congress*, *supra*, I-20 to I-23, *What Are We Spending on Special Education Services* (June 2004). The costs of reimbursing parents for private school placements, such as petitioners seek here, are even larger, averaging more than $26,000 per student—more than four times the cost of public placements. *Id.* at I-30 to I-31. Administration and support services comprise 10 percent of special education spending, *id.* at I-29, and expenditures on assessment, evaluation, and IEP related services amount to $6.8 billion. *Id.* at I-32.

Then there are litigation expenses. In 2000, there were more than 3250 hearings over IEPs. Project FORUM, National Ass'n of State Directors of Special Educ., *Due Process Hearings: 2001 Update*, at 6-7 (Apr. 2002). On average, schools spend $8160-$12,200 for *each* due process hearing or mediation. *See* Jay G. Chambers, *et al.*, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000*, at 8 (May 2003). Given that the average per pupil expenditure for special education services is about $8000, a due process hearing or mediation effectively doubles a school district's cost to educate a single disabled child. *See id.* at 3; *supra* n.3. Moreover, in addition to direct legal and administrative costs, hearings impose substantial opportunity costs for both school districts and students, for educators must be out of the classrooms while attending and even preparing for hearings.[20]

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[20] Data on the benefits of mediation underscore the expenses associated with due process hearings. Texas, for example, estimates saving about $50 million in attorneys' fees and related hearing expenses in the last decade by promoting mediation. *See Special Education—Numbers of Formal Disputes are Generally Low and States are Using Mediation and Other Strategies to Resolve Conflicts*, GAO Rep. No. 03-897, at 18 (2003). A hearing officer alone costs an average of $9000—compared to $1000 for a mediator. *Id.* California likewise reports significant savings from use of mediation—the average cost to the State for a due process hearing ($18,600) is ten times as much as for a mediation session ($1800). *Id.* Overall, 96.3 percent of school districts report that mediation is more cost-effective than formal hearings. *Id.* at 19.

Reversing the burden of proof will increase all these costs. As noted, it will encourage more hearings, with all the costs they entail. And the hearings themselves will be more costly. If schools must anticipate and rebut in advance every conceivable objection—including arguments that a complainant may never have raised in the first place—the costs imposed on them in every case will multiply, even before a hearing commences. These additional costs are necessarily borne by other students, who can ill-afford them. Dollars spent on litigation are dollars that cannot be spent on teaching children in the classroom. Public schools are not profit-making enterprises, and any additional costs must necessarily come out of a district's taxpayer-funded budget at the expense of actual education for both special needs and other children. By contrast, requiring complaining parents to bear the normal burden of proof imposes *no* additional costs on them, because they will have to overcome the schools' evidence regardless of the locus of the burden.

Under the best of circumstances from their perspective, petitioners' rule would result in a extremely small number of additional victories for parents, in cases where the evidence is deemed to be in equipoise. Yet even in those evenly-balanced cases, the parent's evidence would, by definition, be insufficient to overcome the school's. The outcome of all other cases would be unaffected, because either the school districts would carry their affirmative burden or the parents would successfully rebut the school districts' evidence. The additional costs of that rule, however, would be imposed in *every* one of the tens of thousands of IDEA cases brought or threatened nationwide, not just those where the evidence is in equipoise. *See* CADRE, *National Dispute Resolution Use and Effectiveness Study* 18 (Summer 2004) (estimating that there were 27,283 IDEA disputes in 2001). Thus, the few students who might achieve a windfall from petitioners' rule—whose evidence does not overcome that of the school district's but merely equals it—are far outweighed by the millions whose educational benefits will necessarily be curtailed by the additional costs of rebutting hypothetical arguments not yet made and evidence not yet presented.

Local school districts must, and do, comply with their IDEA obligations. But they must also educate *all* their students. Requiring IDEA complainants to bear the normal burden of proof imposes no additional costs on them, whereas shifting the burden ultimately will burden all other children.

C. There Is No Unequal Access To Information

Petitioners contend that the burden of proof should be reversed because school districts allegedly have greater access to relevant evidence. *See* Pet. Br. 39-44. But petitioners' premise is incorrect. Parents in IDEA cases have at least equal—and most likely superior—access to the most important evidence in these cases as the school districts, and much better access to information than virtually any other complainant challenging administrative action.

The ultimate question in every IDEA case is whether an IEP affords a particular child an appropriate education. As the "I" in IEP denotes, this is an individualized inquiry focusing on a particular child's needs. *See Rowley*, 458 U.S. at 181 (FAPE "is tailored to the unique needs of the handicapped child."). Thus, the single most important source of relevant information in every IDEA case—and the only source in many cases—is the child himself or herself. Clearly, parents have at least equal and, in most cases, superior access to that source of information. Parents have lived with their child since birth; they have seen how the child learns; and they are familiar with his or her educational progress over many years. *See Amanda J. ex rel. Annette J.* v. *Clark County Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001) ("because they observe their children in a multitude of different situations, [parents] have a unique perspective of their child's special needs"). If a case requires an evaluation of the child's facilities and skills, the parents can have those evaluations performed without requiring *any* information from the school. Thus, petitioners themselves argue that their own complaint was supported by "those experts *most* familiar" with Brian. Pet. Br. 10 (emphasis added).

To the extent a parent desires further information about a child's current educational progress, all that information is likewise readily available. All parents are able to speak freely and regularly with teachers and administrators at parent-teacher conferences and informally throughout the school year. Congress has also specifically mandated that parents be provided an opportunity "to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child * * * and to obtain an independent educational evaluation of the child." 20 U.S.C. § 1415(b)(1). Parents also are full participants in the entire IEP process and are therefore able, early on, to know exactly what the school district is proposing and why. And before taking any IEP action, the school district must provide, in writing, an "explanation of why [it] proposes or refuses to take the action"; a "description of each evaluation procedure, assessment, record, or report [it] used as a basis for the proposed or refused action"; a "description of other options considered by the IEP Team and the reason why those options were rejected"; and "a description of the factors that are relevant to the [school district's] proposal or refusal." 20 U.S.C. § 1415(c)(1)(B), (E), (F). Finally, another federal law, the Family Educational Rights and Privacy Act, provides parents with further rights to information about their children. *See* 20 U.S.C. § 1232g.

Once a complaint is filed, parents are afforded additional rights to information. The school district's response must include, *inter alia*, yet another "description of each evaluation procedure, assessment, record, or report" used for the IEP action, 20 U.S.C. § 1415(c)(2)(B)(i)(I)(cc), and prior to the hearing the school must also disclose "all evaluations completed by that date, and recommendations based on [its] evaluations, that [it] intends to use at the hearing." *Id.* at § 1415(f)(2)(A). Mediation affords another opportunity for the parents to receive relevant data, if they choose to pursue it. 20 U.S.C. § 1415(e). And before the hearing commences, the school district must convene yet another meeting to discuss the IEP. 20 U.S.C. § 1415(f)(1)(B)(i).

Petitioners and their amici complain that IDEA hearings, like many state administrative adjudications, do not carry full discovery rights such as exist in federal court. But as noted, IDEA provides parents with extensive rights to information—including pre-hearing disclosure of all evidence to be used—and petitioners fail to identify any category of critical information, not already provided, that is uniquely in the hands of school districts.[21] Moreover, while parents have a right to examine "all records relating to [their] child," 20 U.S.C. § 1415(b)(1), the school district is entitled to disclosure of only those evaluations that the parents "intend[ ] to use at the hearing." 20 U.S.C. § 1415(f)(2)(A). Thus, for example, MCPS had no right to receive any of Brian's private school records or any private assessments obtained by his parents that they did not plan to use at the hearing (and that therefore might support MCPS's decision).

This case amply illustrates that there is no structural concern about unequal access to relevant evidence. Brian attended private school through seventh grade. Thus, he had *never* attended MCPS before his IDEA request, and MCPS therefore had *no* prior information about him. The critical issue upon which the ALJ found the entire case turned was whether Brian had a "central auditory processing" problem or instead a "mild speech-language disability." Pet. App. 25-31, 103-108. Brian's parents clearly had superior access regarding what was happening in Brian's own body than did a school system that never met him. Moreover, the ALJ

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[21] State law may provide additional pre-hearing rights to information. Maryland law, for example, affords discovery rights in administrative hearings, including those conducted pursuant to IDEA. *See* Md. Regs. Code tit. 28, § 02.01.10.

found that Brian's prior private-school experience—also unknown to MCPS—supported his case. *Id.* at 109. Nor is this informational balance in any way unusual; even when children have been in public school before, their parents will almost always know more about them.

In short, due to the nature of the IDEA process and the rights conferred by Congress, parents in IDEA hearings have far greater access to relevant information than do virtually all other complainants in administrative proceedings.

D. Petitioners' Other Policy Issues Are Unrelated To The Burden Of Proof And Have Been Directly Addressed By Congress In Any Event

Petitioners and their amici raise two other policy concerns that they contend require flipping the burden of proof: that schools allegedly have greater resources (and therefore better access to attorneys and expert consultants) and that parents of special education students are often unsophisticated. *See, e.g.*, Pet. Br. 10-13; Br. of Council of Parent Attorneys and Advocates at 14-16; Br. of the Arc of the United States at 10-13. Neither of these concerns, however, is related to the locus of the burden of proof or would be affected by altering it. And in any event, Congress has already thoroughly and extensively addressed both concerns in the statute itself.

1. The relative resources of the parties to a proceeding has nothing to do with the burden of proof—as the court of appeals put it, "[w]e do not automatically assign the burden of proof to the side with the bigger guns." Pet. App. 9. For example, the federal government is the wealthiest entity on the planet and has thousands of attorneys at its disposal, but parties challenging its actions bear the ordinary burden of proof. *See* 5 U.S.C. § 556(d). Not only does the law treat all parties equally regardless of financial condition, but reversing the burden of proof will do nothing to counter any perceived resource imbalance. If one party is better able to hire lawyers or consultants, that purported advantage will be

unaffected by the locus of the burden, because the other party will still have to counter the evidence in order to prevail.[22]

As the court of appeals correctly explained (Pet. App. 15), Congress "no doubt" recognized that

> allocating the burden to school systems is not the kind of help parents really need in challenging IEPs. For regardless of which side has the burden of proof in an administrative hearing, parents will have to offer expert testimony to show that the proposed IEP is inadequate. Shifting the burden of proof, in other words, will not enable parents by themselves to mount a serious, substantive challenge to an IEP * * *.

But regardless, Congress has already addressed the issue directly. Most importantly, Congress authorized payment of attorneys' fees to prevailing parties, 20 U.S.C. § 1415(i)(3), to effectuate its intent "that due process procedures, including the right to litigation if necessary, be available to all parents." S. Rep. No. 99-112, at 2 (1985). Such a fee-shifting provision—which is unusual in administrative litigation—provides powerful incentives for the vindication of legitimate claims and strong deterrence against school districts' non-compliance.[23] In part because of this provision, there is a substantial network of attorneys and public interest groups that specialize in representing parents. *See, e.g.*, Br. of *Amici Curiae* Council of Parent Attorneys and Advocates at 3-6. Congress has also decreed that States must bear the costs of mediation, *see* 20 U.S.C. § 1415(e)(2)(D), and the States or local districts foot the bill for the hearings themselves, *see* 20 U.S.C. § 1415(f)(1). Finally, although the availability of expert-witness fees has divided the lower courts, *see* Pet. Br. 47-48 (noting circuit split), Congress is free to authorize such fees as well as any other costs if it believes they are appropriate.

Recently, however, Congress has expressed concern the other way: that parents may be bringing *too many* unjustified suits and may be utilizing lawyers *too much*. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II), (III) (authorizing fee awards against parents and their attorneys) (added in 2004); 20 U.S.C. § 1415(i)(3)(D)(ii) (barring attorneys' fees for attendance at IEP meetings or mediations) (added in 1997). In any event, Congress' careful attention to these issues underscores that it—not this Court—is the proper forum to address any concerns regarding resources for litigation.

2. The same is true with petitioners' assertions regarding parents' lack of sophistication. There is clearly no such lack in this case, where at least one of Brian's parents is a lawyer and they were represented by counsel.[24] But in any event, this issue as well is unrelated to the burden of proof. Even if the school bears the affirmative burden, parents will have to

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[22] In any event, petitioners' assertions about the resources of school districts are vastly overstated. Most school districts are small—nearly half nationwide have total enrollments of less than 1000, and 12.4 percent serve less than 150 students. *See* National Center for Educ. Statistics, *Overview of Public Elementary and Secondary Schools and Districts: School Year 2000-01*, Table 7, *at* http://www.nces.ed.gov/pubs2002/overview/index.asp.

[23] *See Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 639 (2001) (when attorneys' fees make noncompliance expensive, parties seek to conform to legal requirements before litigation is threatened) (citing Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 Vand. L. Rev. 1069, 1121 (1993)); *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980) (availability of attorneys' fees facilitates the bringing of complaints); Pet. App. 15 ("Congress recognized that parents need professional assistance, and the IDEA therefore allows parents who prevail in due process hearings to recover their fees for hiring lawyers.").

[24] Mr. Schaffer is an attorney with a private law firm, and Mrs. Schaffer, who also has a law degree, served as an assistant to the head of Green Acres, the private school that Brian previously attended. *See* 3 July 2, 1998 ALJ Hrg. 551.

present their own case regardless of their sophistication and will not prevail unless their evidence outweighs the school's.

Congress, however, has addressed this issue as well, and has done so directly. As discussed in Part I.B, IDEA imposes painstakingly detailed mandatory obligations on schools to notify and educate parents about their legal rights and to shepherd them through the process, and Congress has also funded centers to specifically train and assist parents in exercising their rights. As this Court has held, to the extent schools have any "natural advantage" when disputes arise Congress "incorporated an elaborate set of * * * 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *Burlington*, 471 U.S. at 368. If other safeguards are needed, they should be created by Congress after careful study, not by this Court.

As the court of appeals noted, Congress was "keenly aware that school systems have professional expertise and that parents do not" and "[i]t was for this very reason that Congress imposes statutory safeguards to assist parents in becoming substantively informed." Pet. App. 15. Among other requirements, schools districts or state agencies must:

- provide every parent at key intervals with "[a] copy of the procedural safeguards available" to them, which must contain a "full explanation" of fifteen specific issues, 20 U.S.C. § 1415(d)(1)(A), (2);
- provide written notice of all IEP actions, in the parents' native language if feasible, 20 U.S.C. § 1415(b)(3), (4);
- develop a "model form" for due process complaints, 20 U.S.C. § 1415(b)(8);
- notify parents before taking any IEP action that they "have protection under the procedural safeguards of [IDEA]" and listing "sources for parents to contact to obtain assistance in understanding the provisions of [IDEA]," 20 U.S.C. § 1415(c)(1)(C), (D); and

- appoint a surrogate for the child where the parents cannot be located, 20 U.S.C. § 1415(b)(2)(A).

Congress has also appropriated substantial sums for "parent training and information centers" to, *inter alia*, "assist parents to understand the availability of, and how to effectively use, procedural safeguards under [IDEA]." 20 U.S.C. § 1471(b), (b)(8).

In sum, IDEA provides more direct assistance to parents in vindicating their legal rights against government—including procedural rights, informational guarantees, and attorneys' fees—than exists in perhaps any other federal statute. Congress has deemed these "elaborate" safeguards sufficient. *Burlington*, 471 U.S. at 368. As the court of appeals noted, "[i]f experience shows that parents do not have sufficient access to substantive expertise under the current statutory scheme, Congress should be called upon to take further remedial steps." Pet. App. 15. But abrogating the normal burden of proof by judicial decision will just increase costs on schools without affecting the resource and sophistication imbalances of which petitioners complain.

E. IDEA Makes Schools Directly Accountable For Fulfilling Their Statutory Obligations

Nor is there any reason for this Court to abrogate the normal burden of proof in order to ensure that schools follow their obligations under IDEA. Congress has already expressly provided a robust array of enforcement mechanisms. Just as federal agencies are held fully accountable under the APA, which adopts the ordinary burden of proof, so too are school districts held accountable in IDEA due process hearings conducted under the same rule. Petitioners and their amici complain that school districts sometimes do not follow the mandatory IDEA procedures. In this case, the ALJ specifically found that "[t]here has been no demonstration of any violation of a procedural safeguard," and that "[t]here has been a properly formulated IEP." *Id.* at 145. IDEA provides a direct remedy for procedural noncompliance in any event. If a school district has failed to follow IDEA's detailed procedures, a hearing officer may find that such failure amounts to a denial of a free and appropriate public education. *See* 20 U.S.C. § 1415(f)(3)(E)(ii).

But these private rights are far from the only enforcement mechanisms. To receive federal funding, each State must demonstrate annually to the Secretary of Education that it is complying with IDEA, and Congress has directed the Secretary to withhold funds from any State that fails to substantially comply. 20 U.S.C. §§ 1412, 1416. Each local school district must furthermore demonstrate to its state education agency that it is complying with IDEA or risk losing state funding. 20 U.S.C. § 1413(a). Nor are due process hearings the only mechanism for resolving complaints: the Secretary requires that each State agency have a process for resolving individual complaints that local school districts have violated the statute. *See* 34 C.F.R. §§ 300.660 to 300.662.

In light of this extraordinary panoply of existing enforcement mechanisms, there is no reason for this Court to create additional burdens that will simply multiply costs and encourage litigation while doing little, if anything, to further compliance. In fact, as next shown, if any State believes it would be appropriate as a policy matter to abrogate the normal burden of proof with respect to its own schools, IDEA's cooperative federalism structure likely would not prevent that State from legislating its own rule in that regard.

III. STATES MAY VOLUNTARILY ASSUME ADDITIONAL OBLIGATIONS FOR THEIR SCHOOLS NOT INCONSISTENT WITH IDEA

Petitioners argue that federal law—that is, IDEA—imposes the burden of proof on school districts in *all* administrative hearings initiated pursuant to IDEA, regardless of which party initiates the hearing. For the reasons discussed above, the court of appeals correctly rejected that argument. But although IDEA does not impose a standing federal burden of proof on school districts in every case, States are not

prevented from voluntarily assuming additional obligations through legislation that is not inconsistent with IDEA.

As explained above, like other Spending Clause statutes, IDEA establishes minimum federal requirements that attach as conditions to the receipt of federal financial assistance. States that accept such funding must comply with those federal standards, but they remain free to expand on IDEA's requirements and grant additional benefits to their residents. *See, e.g.*, *Gill* v. *Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1035 (8th Cir. 2000); *Johnson* v. *Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1029 (10th Cir. 1990); *Lagares* v. *Camdenton R-III Sch. Dist.*, 68 S.W.3d 518, 524 (Mo. Ct. App. 2002). Indeed, IDEA expressly recognizes that States may impose their own special education standards for their school systems. 20 U.S.C. § 1401(9)(B). In addition, IDEA directs States receiving federal assistance to "establish and maintain procedures" that give effect to the Act's requirements. 20 U.S.C. § 1415(a). Accordingly, it may be possible to interpret IDEA as authorizing States to voluntarily assume through their own statutory law a different burden of proof for their school districts in IDEA hearings, and at least a few States have passed such laws. *See* Pet. Opp. 19-20.

But that issue is not presented by this case. Petitioners do not and cannot argue that *state* law imposes the burden of proof on Maryland school districts such as MCPS in IDEA hearings; instead, as discussed, their position is that federal law imposes that burden. In any event, because Maryland has not enacted any statute assigning the burden of proof to its school systems in IDEA hearings, the federal burden of proof clearly governs this case—the party that initiates the IDEA hearing and seeks relief bears the burden of proof.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

MAREE F. SNEED*
JONATHAN S. FRANKLIN
GREGORY G. GARRE
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6416

ZVI GREISMANN
MONTGOMERY COUNTY
PUBLIC SCHOOLS
850 Hungerford Drive
Rockville, MD 20850
(301) 279-3549

JUDITH S. BRESLER
ERIC C. BROUSAIDES
REESE & CARNEY, LLP
10715 Charter Drive
Columbia, MD 21044
(301) 621-5255

JEFFREY A. KREW
4785 Dorsey Hall Drive
Suite 120
Ellicott City, MD 21042
(410) 997-6900

Counsel for Respondents

* Counsel of Record

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IN THE

Supreme Court of the United States

BRIAN SCHAFFER, a minor; by his parents and next friends,
JOCELYN AND MARTIN SCHAFFER,
Petitioners,
v.
JERRY WEAST, Superintendent of Montgomery
County Public Schools, *et al.*,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit**

BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, PENNSYLVANIA ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, PUBLIC SCHOOL SUPERINTENDENTS' ASSOCIATION OF MARYLAND, AND CONNECTICUT ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

PAMELA HARRIS
SHANNON PAZUR
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5300

JULIE WRIGHT HALBERT
(*Counsel of Record*)
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Avenue, NW, Suite 702
Washington, D.C. 20004
(202) 394-2427

Attorneys for Amici Curiae

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BRIEF OF THE COUNCIL OF THE GREAT CITY SCHOOLS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL EDUCATION ASSOCIATION, PENNSYLVANIA ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, PUBLIC SCHOOL SUPERINTENDENTS' ASSOCIATION OF MARYLAND, AND CONNECTICUT ASSOCIATION OF PUBLIC SCHOOL SUPERINTENDENTS AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of the Council of the Great City Schools, American Association of School Administrators, National Education Association, Pennsylvania Association of School Administrators, National Association of Elementary School Principals, Public School Superintendents' Association of Maryland, and Connecticut Association of Public School Superintendents as amici curiae in support of respondent.[1]

INTEREST OF AMICI CURIAE

The Council of the Great City Schools ("Council") is a coalition of 65 of the nation's largest urban public school systems.[2] Founded in 1956 and incorporated in 1961, the

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than amici, their members, or their counsel contributed monetarily to the brief.

[2] Member school districts include Albuquerque Public Schools, Anchorage School District, Atlanta Public Schools, Austin Independent School District, Baltimore City Public Schools, Birmingham City Schools, Boston Public Schools, Broward County Public Schools, Buffalo City School District, Caddo Parish School District, Charleston County Public Schools, Charlotte-Mecklenburg Schools, Chicago Public Schools, Christina School District, Cincinnati Public Schools, Clark County School District, Cleveland Municipal School District, Columbus Public Schools, Dallas Independent School District, Dayton Public

Council is located in Washington D.C., where it works to promote urban education through legislation, research, media relations, instruction, management, technology, and other special projects. The Council serves as the national voice for urban educators, providing ways to share promising practices and address common concerns.[3] For the past several years, the Council's legislative and legal staffs have participated extensively in congressional consideration of the Individuals with Disabilities Education Act Amendments of 1997 and

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Schools, Denver Public Schools, Des Moines Independent Community School District, Detroit Public Schools, District of Columbia Public Schools, Duval County Public Schools, Fort Worth Independent School District, Fresno Unified School District, Guilford County Schools, Hillsborough County School District, Houston Independent School District, Indianapolis Public Schools, Jackson Public School District, Jefferson County Public Schools, Kansas City School District, Long Beach Unified School District, Los Angeles Unified School District, Memphis City Public Schools, Metropolitan Nashville Public Schools, Miami-Dade County Public Schools, Milwaukee Public Schools, Minneapolis Public Schools, New Orleans Public Schools, New York City Department of Education, Newark Public Schools, Norfolk Public Schools, Oakland Unified School District, Oklahoma City Public Schools, Omaha Public Schools, Orange County Public Schools, Palm Beach County Public Schools, Philadelphia Public Schools, Pittsburgh Public Schools, Portland Public Schools, Providence Public Schools, Richmond Public Schools, Rochester City School District, Sacramento City Unified School District, Salt Lake City School District, San Diego Unified School District, San Francisco Unified School District, Seattle Public Schools, St. Louis Public Schools, St. Paul Public Schools, Toledo Public Schools, and Tucson Unified School District.

[3] The Great City Schools' enrollment represents 15.5% of total national public school enrollment. Nearly two-thirds of our students are eligible for a free-lunch subsidy, compared to just over one-third nationally. In addition, more than three-quarters of Great City Schools' students are from minority backgrounds, primarily African American, Hispanic, or Asian American, compared with the 40.5% national average. Finally, the percentage of our students whose families do not speak English as their first language is double the national average.

the Individuals with the Disabilities Education Improvement Act of 2004.

The American Association of School Administrators (AASA), founded in 1865, is the professional association of over 14,000 local school system leaders across America. AASA's mission is to support and develop effective school administrators who are dedicated to the highest quality education for all children. AASA supports equal educational opportunity as a key factor in providing the highest quality public education for all children.

The National Education Association (NEA) is a nationwide employee organization with more than 2.7 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA has long supported a free, appropriate public education for all students with disabilities. Because many of its members are special and regular education teachers, and education support professionals who provide education and support services to students with disabilities, NEA has a special interest in this case.

The Pennsylvania Association of School Administrators, (PASA) is a non-profit association composed of school superintendents, Intermediate Unit Executive Directors and other school administrators. Its purposes, among others, are to support the general educational welfare of the Commonwealth of Pennsylvania and to advance educational standards in our schools. Its members are responsible under state law and regulation for the superintendence and supervision of the public schools of the Commonwealth of Pennsylvania, and have under those laws and specific responsibility to administer special education programs in accordance with the Individuals with Disabilities Education Act. In the past, PASA has participated as an amicus in various Pennsylvania appellate cases on important educational issues.

The National Association of Elementary School Principals (NAESP), founded in 1921, represents 30,000 elementary and middle level principals in the United States and abroad. The mission of NAESP is to lead in the advocacy and support for elementary and middle level principals and other education leaders in their commitment to all children.

The Public School Superintendents' Association of Maryland (PSSAM) provides leadership for quality education in the State of Maryland by addressing educational issues through the unified voice of all of Maryland's public school superintendents. The PSSAM includes the superintendents of all 24 of Maryland's local school districts, and is actively engaged in the legislative process at both the state and federal levels in order to ensure the highest quality education for all of Maryland's public school students.

The Connecticut Association of Public School Superintendents (CAPSS) is a statewide nonprofit educational administration organization whose membership includes all of Connecticut's public school superintendents and whose mission is to lead the continuous improvement of public education for all students by advocating public policy for children, and by developing and supporting executive school leaders. CAPSS is actively involved in monitoring state and federal legislative activity and strives to influence positive laws and regulations affecting the education of Connecticut's public school students.

SUMMARY OF ARGUMENT

I. The Individuals with Disabilities Education Act ("IDEA") provides a roadmap for both parents and schools to ensure that every child with a disability receives a free appropriate public education ("FAPE"). The parties and their amici are united in their sincere desire to achieve this goal. However, amici are concerned that this goal is being undermined as schools are forced to devote more and more resources to *litigating* IDEA compliance, leaving fewer resources to develop and implement proper educational plans for children with disabilities. Placing the burden of proof on schools when such plans are challenged by parents would only exacerbate that problem, increasing both the volume of litigation – contrary to Congress' stated intention – and also the expense of that litigation. As a result, school resources – both direct costs and the time that teachers would otherwise spend in the classroom – would be drained from instruction and other educational services and pumped into the adversarial process. That result benefits no one, least of all the children most in need of special education services.

II. Congress has already taken great care to ensure a level playing field for parents who must navigate the IDEA process. As the Court has recognized, the procedural protections built into the IDEA are intended to keep parents involved, informed and empowered every step of the way. *See School Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985). These safeguards nullify any perceived information or resource advantage the schools might otherwise enjoy. Accordingly, it is not necessary to reassign the burden of proof in reliance on vague notions of fairness. In the absence of any indication that Congress intended to alter the traditional default rule, the burden of proof ought to remain with the complaining party.

ARGUMENT

The IDEA is intended to "ensure that all children with disabilities have available to them a free appropriate public education"– one that "emphasizes special education and related services" designed to prepare such children for "further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).[4] In pursuit of that goal, the IDEA comprehensively governs every aspect of the education of children with disabilities, starting as early as pre-school and continuing through the transition to adulthood.[5]

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[4] The statutory sections cited herein refer to the statute as amended in 2004 ("IDEA 2004"), and are effective as of July 1, 2005. These sections are substantially similar to the previous versions except as otherwise noted.

Beginning with the initial evaluation and identification of a child with a disability, the IDEA imposes complex substantive and procedural requirements on local educational agencies ("LEAs"). The IDEA specifies the standards by which LEAs evaluate children and determine eligibility for services under the statute. It also imposes strict timelines on the evaluation process and provides for notice and consent procedures. *See* 20 U.S.C. § 1414(a)(1), (b). And under the IDEA, schools must reevaluate a child's abilities and continued eligibility at least once every three years. *Id.* § 1414(a)(2).

Once a child has been thoroughly evaluated and identified as having a disability, the statute mandates a cooperative effort among parents, teachers, school administrators and others to create an Individualized Education Program ("IEP") for the child. *See* 20 U.S.C. § 1414(d). Among other things, the IEP must describe the effects of the child's disability; set short-term and long-term performance goals; explain how such progress will be measured; and describe the regular education, special education and related services, and other accommodations that are necessary to provide that child with a FAPE. *See* 20 U.S.C. § 1414(d)(1)(A)(i). The IEP must also be continuously reviewed and revised, at least annually. *See* 20 U.S.C. § 1414(d)(4).

The IDEA also prescribes if and how schools may discipline students with disabilities, and attaches additional procedural requirements to the disciplinary process that are not applicable to non-disabled students. *See* 20 U.S.C. § 1415(k). For instance, in most circumstances a school may not order a change in placement, such as a school suspension, that exceeds ten days unless the IEP team determines that the student's misbehavior is not a manifestation of his or her disability. If it is not, then the school may discipline the student pursuant to normal procedures. But if the misbehavior is caused by the child's disability, then the IEP team must complete a functional behavioral assessment ("FBA") and then create a behavioral intervention plan ("BIP") for the student in lieu of standard discipline. *See id.*

Each step of the way, both the parents of a child with a disability and the child's school are entitled to file a complaint, and ultimately proceed to a due process hearing, to address any procedural or substantive compliance issues. *See* 20 U.S.C. § 1415(b)(6)(A) (any party may "present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"); *id.* § 1415(k)(3)(A) (any party who disagrees with a disciplinary action or determination "may request a hearing"). For example, these procedures may be initiated to address the identification, evaluation and reevaluation of a child with disabilities; the provision of educational services; the provision of related and supplementary support services; manifestation determinations; a change of placement for an educational or a disciplinary issue; and behavioral intervention plans.

The specific question presented in this case is which party should bear the burden of proof at an administrative due process hearing concerning the adequacy of a child's IEP – the complaining party or the school. Amici agree with respondent that when the adequacy of an IEP is at issue, the IDEA provides no basis for departing from the traditional rule that the complaining party bears the burden of proof.[6] But amici are equally concerned with all of the other issues that may be the subject of administrative hearings under the IDEA. As described above, it is not just the formulation of an IEP that may trigger an administrative hearing under the IDEA, but *any* school action related to the obligation to provide a FAPE. A ruling by this Court adopting petitioners' "fairness" argument could be understood by hearing officers and courts to shift the burden of proof to schools in *all* of those situations – upsetting a complex statutory and regulatory regime and exacting an enormous cost from schools.

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[5] Schools are required to provide a FAPE to children between ages 3 and 21. *See* 20 U.S.C. § 1412(a)(1)(A).

Amici do not believe that was the result intended by Congress. As explained below, a presumption that a school has failed to comply with its obligations under the statute devalues the expertise and substantial efforts that lie behind school efforts under the IDEA, increases both the likelihood and the expense of litigation, and drains resources from the schools' primary mission of educating children. None of these negative consequences are necessary; Congress already has taken care to provide parents with ample procedural safeguards in order to ensure fair outcomes. Nothing in the statute suggests that Congress doubted the utility of the procedures it prescribed, and intended also to saddle schools with a ubiquitous burden of proof.

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[6] Accordingly, amici join respondent's argument that all indicia of congressional intent support the conclusion that the traditional default rule – that the complaining party bears the burden of proof – applies to proceedings under the IDEA. In light of the extraordinary burdens that would be imposed on schools by a contrary rule, however, amici believe that a uniform federal rule is both appropriate and consistent with that congressional intent; consequently, states may not voluntarily assume the burden of proof consistent with the IDEA.

I. SHIFTING THE BURDEN OF PROOF TO SCHOOL SYSTEMS WOULD DRAIN SCARCE RESOURCES AND UNDERMINE THE EDUCATIONAL MISSION OF PUBLIC SCHOOLS.

Most public school systems operate under very tight and limited budgets. Implementation of the IDEA has further strained public schools' finances by imposing substantial costs on schools for the education of students with disabilities; in fact, public schools spent over twenty percent of their general operating budgets on special education during the 1999-2000 school year – a total of $78.3 billion. Thomas Parrish et al., Center for Special Education Finance, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* 22 (2004). While amici embrace the opportunity and responsibility to provide students with disabilities with a free appropriate public education, burdensome administrative requirements and costly litigation procedures undermine this goal by siphoning already scarce resources from the core mission of education. Rather than furthering the IDEA's goal of promoting higher quality education for students with disabilities, these expenditures divert resources from both special and general education services. That effect will only be exacerbated if school districts are forced to bear the burden of proof with regard to the adequacy of IEPs – and magnified still further if the same burden is imposed in the litany of other hearings held under the IDEA regarding the central statutory obligation of providing free appropriate public education.

A. Deeming IEPs Presumptively Invalid Would Be Inconsistent With The Time, Effort, And Expertise Devoted To Their Development.

1. Under the IDEA, school districts invest significant time and money in the initial development of IEPs. That process begins when school districts evaluate and identify

students in need of special education;[7] because the results of the tests used to determine eligibility are also used to develop an appropriate education plan, the evaluation must assess the student's abilities in all areas relevant to the suspected disability. Office of Special Education & Rehabilitation Services, U.S. Department of Education, *A Guide to the Individualized Education Program* 2 (2000) ("IEP Guide"). More specifically, initial evaluations may include psychological, speech, occupational therapy, physical therapy, academic, social, emotional, vision, hearing, or any other appropriate assessments based on the child's needs. Some of those initial evaluations are done twice, the second time by an outside evaluator: if parents disagree with the results of the school's assessment, then they may request that the school pay for an independent educational evaluation ("IEE"), at an average cost of $1500. *IDEA: What's Good for Kids What Works for Schools? Hearing Before the S. Comm. on Health, Education, Labor & Pensions,* 107th Cong. 73 (2002) ("*Hearings*") (statement of Kim Goodrich Ratcliffe, Ed.D., Director of Special Education, Columbia Public Schools, Columbia, MO; Co-founder, Missouri School Boards' Association's Special Education Advocacy Council).

If a student is identified as a child with a disability, then a full IEP team must be assembled immediately. 34 C.F.R. § 300.343(b). At a minimum, each IEP team consists of:

1) the parents of the child;
2) at least one regular education teacher of the child;
3) at least one special education teacher of the child;
4) a representative of the LEA who is "qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities," "is knowledgeable about the general education curriculum," and "is knowledgeable about the availability of resources" of the LEA;
5) an individual with the capacity to "interpret the instructional implications of evaluation results";
6) "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate"; and
7) "whenever appropriate, the child with a disability."

20 U.S.C. § 1414(d)(1)(B).

Unless the parents and the LEA agree that a team member's attendance is not necessary, the *entire* IEP team must attend each meeting. *Id.* § 1414(d)(1)(C).

Once the IEP team is assembled, it must meet within thirty days, following the procedures mandated in the regulations. 34 C.F.R. § 300.343(b)(2). In preparation for the first meeting, the "[s]chool staff must contact the participants, including the parents; notify parents early enough to make sure they have an opportunity to attend; schedule the meeting at a time and place agreeable to parents and the school; tell the parents the purpose, time, and location of the meeting; tell the parents who will be attending; and tell the parents that they may invite people to the meeting who have knowledge or special expertise about the child." IEP Guide, *supra*, at 3.

Under the IDEA, the IEP team is charged with developing an IEP that meets strict substantive requirements. Every IEP must include, at a minimum:

1) a detailed "statement of the child's present levels of academic achievement and functional performance";
2) "a statement of measurable annual goals, including functional and academic goals";
3) a description of how the child's progress toward the annual goals will be measured and how the child's

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[7] An LEA may evaluate a child for disability on its own initiative, and must conduct such an evaluation in response to a request from the parents of a child, a State educational agency, or other State agency. *See* 20 U.S.C. § 1414(a)(1)(B).

parents will be regularly informed of their child's progress;

4) a detailed "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child";
5) "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class" and in nonacademic activities;
6) a statement of any individual modifications in the administration of state or districtwide assessments of student achievement that are needed in order for the child to participate in the assessment;
7) "the projected date for the beginning of the services and modifications" described above and the "anticipated frequency, location, and duration of those services and modifications"; and
8) a statement of age appropriate postsecondary goals and transition services.

20 U.S.C. § 1414(d)(A); 34 C.F.R. § 300.347.[8]

2. As should be clear from the description above, the process of creating even one customized IEP is extremely time- and resource-intensive. When those costs are multiplied by the number of IEPs developed each year, they become enormous. One Virginia school district, for example, has spent an average of 83.5 hours and nearly $4,000 in the process of identifying each student with a disability and developing an initial IEP; multiplied by the number of students with disabilities in the county, the district has spent more than $86,000,000. *Rethinking Special Education: How to Reform the Individuals with Disabilities Education: Hearing Before the Subcomm. on Educ. Reform of the H. Comm. on Educ. and the Workforce*, 107th Cong. 11 (2002) (statement of Gregory Lock, Principal, Oak View Elementary School, Fairfax, Virginia). And nationwide, an estimated $6.7 billion was spent on assessment, evaluation, and development of IEPs during the 1999-2000 school year alone. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Special Education Services in the United States, 1999-2000?* 14 (2004).

Perhaps the most significant cost associated with the initial development of IEPs, however, is the cost in teacher and other professional time. Like general education teachers, special education teachers are responsible for a good deal of standard administrative work: completing lesson plans, grading papers, developing report cards, engaging in written communication with parents, and the like. But unlike their general education counterparts, special education teachers must also devote substantial time to their function as IEP team members, helping to create IEPs, attending IEP meetings, and complying with procedural rules such as parental notice requirements. In one study, special education teachers devoted nearly one hour per day to IEP-related activities. John A. Kirlin et al., *Final Report on Focus Study III: The Burden of Paperwork and Administrative Duties in Special Education* 31 (2004). Active participation by special education teachers and general education teachers in this process is an invaluable piece of the commitment to providing FAPE to students with disabilities. And that investment should not be underestimated: the time committed to the IEP process either comes on top of what is already a full work day[9] or pulls teachers out of classrooms,[10] depriving students with disabilities of critical time with their instructors.

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[8] The regulations provide more detailed requirements for each of these broader categories. Indeed, several handbooks for school districts have included sections numbering hundreds of pages on how to comply with these guidelines. *See, e.g.*, Barbara D. Bateman & Mary Anne Linden, *Better IEPs: How to Develop Legally Correct and Educationally Useful Programs* (3d ed. 1998); Susan Gorn, *What Do I Do When . . . The Answer Book on Individualized Education Programs* (1997).

In addition to general and special education teachers, countless other professionals devote their expertise and their energies towards the development of an appropriate IEP. Psychologists, speech therapists, occupational and physical therapists, school nurses, case managers, LEA representatives (usually principals or assistant principals), and other appropriate professionals regularly participate as members of IEP teams to ensure that IEPs are reasonably calculated to

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[9] These requirements have taken their toll on instructors; many special education teachers feel that excessive IDEA paperwork interferes with their ability to serve students with disabilities and causes them dissatisfaction in their employment. Study of Personnel Needs in Special Education, *Paperwork in Special Education* (2002), *available at* http://ferdig.coe.ufl.edu/spense/Paperwork.pdf. These burdensome requirements have prompted many special education teachers to leave the field, contributing to a chronic shortage of special education instructors. John Boehner, Chairman, H. Educ. & the Workforce Comm., *Bill Summary: Strengthening and Renewing Special Education* (Nov. 17, 2004), http://edworkforce.house.gov/issues/108th/education/idea/1350confsummary.htm. In the 1999-2000 school year, more than 12,000 openings for special education teachers either remained vacant or were filled by substitutes. Study of Personnel Needs in Special Education, *Summary Sheet: Recruiting and Retaining High Quality Teachers* 1 (2002), *available at* http://ferdig.coe.ufl.edu/spense/policymaker5.pdf. "Ninety-eight percent of school districts report special education teacher shortages." President's Commission on Excellence in Special Education, *A New Era: Revitalizing Special Education for Children and Their Families* 52 (2002).

[10] The burdens have become so excessive in some places that school districts have allocated funds specifically for hiring substitute teachers for instruction while special education teachers are completing paperwork. *See Hearings*, *supra*, at 11.

provide educational benefit to students.[11] Not only are all of these people highly trained and educated, but they are also licensed or certified by their states. They may be required to attend several team meetings to develop a single IEP, and each meeting can last several hours. Indeed, "it is not unusual for a student's IEP to take many hours to develop and 20 pages or more to describe." Bridget A. Flanagan, *Individuals with Disabilities Education Act*, San Francisco Att'y, April/May 1999.

After educators and other experts have poured such extensive energy and resources into the development of IEPs, it would make no sense to adopt a rule declaring those IEPs presumptively invalid. An IEP is not some back-of-the-envelope draft, hastily put together and warranting no special deference. It represents the hard work and best efforts of a team of professional experts, and is the end product of an elaborate and inclusive process expressly created by Congress and delegated to the LEA. An IEP should carry a strong presumption of validity – not the presumption of inadequacy that would result were the burden of proof shifted to schools. *See* Pet. App. 14 ("presumption of inadequacy" signaled by putting burden on schools "would go against a basic policy of the IDEA, which is to rely upon the professional expertise of local educators"); *Alamo Heights Indep.*

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[11] *See, e.g.*, *Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609, 620 (5th Cir. 2003) (IEP meeting participants included nine persons: student's regular and special education teachers; social worker; physical therapist; occupational therapist; adaptive physical education teacher; principal; IEP facilitator; and attorney); *Peter G. v. Chi. Pub. Sch. Dist. No. 299 Bd. of Educ.*, No. 02 C 0687, 2003 U.S. Dist. LEXIS 460, at *8-9 (N.D. Ill. 2003) (IEP meeting participants included twelve persons: the Assistant Director of Citywide Special Education, serving as the case manager; two speech and language pathologists; an early childhood special education facilitator; attorney; occupational therapist; physical therapist; two early childhood special education teachers; general education teacher in physical education; student's parents; and plaintiff's attorney's legal assistant and parent advocate).

Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986) (placing burden of proof on parents in "deference to th[e] statutory scheme and the reliance it places on the expertise of local education authorities"); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) (same).

B. Shifting the Burden of Proof to Schools Would Increase Both The Amount And The Expense Of Litigation, At The Cost Of Educational Programming For All Children.

Amici believe the time and money invested in the development of IEPs are well spent, and necessary to achieve the goal shared by all parties and articulated by the IDEA – the provision of a free appropriate public education to children with disabilities. However, amici are deeply concerned that the cost of *litigating* IEPs is increasingly undermining the ability of school districts to achieve that goal for all students. More and more, school districts are forced to devote significant portions of both their general and special education budgets to litigation. Andriy Krahmal et al., *"Additional Evidence" Under the Individuals with Disabilities Education Act: The Need for Rigor*, 9 Tex. J. C.L. & C.R. 201, 220 (2004) ("unduly expending resources for protracted proceedings under the IDEA's hearing/review process diverts funding from education to funding for litigation"). Shifting the burden of proof to schools will only make that litigation more common and more expensive – leaving schools with fewer resources to devote to their broader mission of providing quality education to students both with and without disabilities.

1. Contrary to Congress' stated goal of encouraging informal resolution of IDEA disputes, 20 U.S.C. § 1400(c)(8), placing the burden of proof on schools in every instance will increase incentives for parents to litigate while reducing incentives for them to reach mediated solutions or other cooperative outcomes. Under such a system, parents would need to invest fewer resources to prevail while schools would be forced to invest more, creating greater incentives for parents to pursue litigation. *See* Thomas R. Lee, *Pleading and Proof: The Economics of Legal Burdens*, 1997 B.Y.U.L. Rev. 1, 21. What statistics are available bear out this common-sense proposition. For instance, in the Second Circuit, where the burden is on the school, 58.83 due process complaints were filed for every 10,000 students with disabilities in 2002-2003; by contrast, in the Fifth Circuit, where the burden is on the parents, only 4.6 complaints were filed per 10,000 students with disabilities. *See* Consortium for Appropriate Dispute Resolution in Special Education, *Dispute Resolution National Summary Statistics for School Year 2002-2003: Hearing Events* (Apr. 20, 2005). While filing rates obviously are influenced by any number of variables, these numbers are fully consistent with the incentives created by the placement of the burden.

Indeed, if the burden were shifted, parents would have new incentives to engage in precisely the kind of gamesmanship that appears to have marked this very case, in which the ALJ noted evidence "strongly suggest[ing]" that the Schaffers were engaged in a sham proceeding designed "to simply obtain funding from MCPS for a predetermined decision to have [their son] attend private school." Pet. App. at 113a, 147a n.6. Though private school placements are of course sometimes warranted, it is also true that the facts of this case are not unique, and that parents often enter into the IEP process intent on procuring public funding for private-school placements regardless of the services available to their children in the public schools. *See, e.g., Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 503-04 (6th Cir. 1998); *Sanger v. Montgomery County Bd. of Educ.*, 916 F. Supp. 518, 526 (D. Md. 1996). The cost of such private-school placements – reportedly around $25,000 annually per child in the nation's three largest school districts[12] – represents an enormous expenditure of funds diverted from both general curricular services and specialized programs of compensatory education or language acquisition for low-income, minority, and limited English proficient children. A rule making it possible for parents to prevail without actually carrying the burden of proof would only invite additional litigation designed to shift the costs of private-school education from parents to public schools.

Through IDEA 2004, Congress clearly expressed its intent to promote collaboration between parents and school districts and to reduce litigation. 20 U.S.C. § 1400(c)(8) ("Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways."). Requiring school districts to bear the burden of proof would promote litigation and directly undermine these goals.

2. The risk of increased litigation is deeply troubling in light of the onerous costs – both direct and indirect – already being incurred to resolve these disputes. During the 1999-2000 school year alone, school districts spent approximately $90.2 million on mediation and administrative hearings and $56.3 million on litigation. Jay G. Chambers, et al., American Institutes for Research, *What Are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 5 (2003) ("*Procedural Safeguards*"). Each litigation case that was pending during that year cost an average of $94,600. *Id.* at 8. As for administrative hearings, on average, each involves one to two weeks of testimony, *Hearing*, *supra*, at 73, and may span several different sessions and result in thousands of pages of transcript and hundreds of pages of exhibits, Perry A. Zirkel, *Transaction Costs and the IDEA*, Education Week, May 21, 2003. An estimated $8,160 to $12,200 was spent on the average mediation or due process case in

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[12] Data on file with the Council of the Great City Schools.

1999-2000. *Procedural Safeguards*, *supra*, at 8, 22. Even a single administrative hearing may cost as much as $25,000-$30,000; in some cases, the cost of one hearing can be so high that it exceeds a small school district's yearly instructional budget. *Hearings*, *supra*, at 73.[13]

A particularly egregious example of the extent of litigation costs is found in *Deal v. Hamilton County Board of Education*, 392 F.3d 840 (6th Cir. 2005), a Tennessee case involving a challenge to the adequacy of an IEP that has been ongoing for five years. The due process hearing alone included twenty-seven days of testimony from twenty witnesses and tens of thousands of pages of exhibits. *Id.* at 847. The expense only mounted as the case went to litigation: costs to the Hamilton County School District have already reached $2.3 million, including almost $48,000 for one expert witness and $18,000 for a doctor. John Madewell, *U.S. Court Of Appeals Rules In Favor Of Parents With Autistic Child* (Apr. 5, 2005), http://www.newschannel9.com/engine.pl?station=wtvc&id=880&template=breakout_story1.shtml&dateformat=%M+%e (last visited June 23, 2005).

Deal is only one of many examples in which final decisions have been issued years after the initial placement, and only after extensive administrative hearing time and litigation. *See* Zirkel, *supra*. The costs to schools in such cases are enormous. There are of course the direct costs of attorney and expert fees. And the indirect costs, though harder to quantify, are just as severe: the costs of having relevant teachers and school administrators taken away from their classrooms and offices to participate in hearings and litigation. To compensate for time lost in classrooms, schools must pay to hire substitutes – another expense associated with litigation over IEPs. And substitutes are less likely to be knowledgeable about students' individualized needs and thus less able to provide high quality instruction. The end result is that students are deprived of the educational services they need to succeed.

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[13] Other estimates are even higher. *See* David Gruber, *Communication and Conflict Resolution Skills Can Lead to Lasting Relationships and Positive Results for Children*, http://www.cenmi.org/focus/dispute/article_05-02.asp (last visited 6/23/2005) ("Reaching a decision through a due process hearing can take up to five months and cost up to $40,000. Litigation can take up to two years and cost even more.").

But the drain on educational resources encompasses more than just the actual hours spent in hearings and in court. School districts know that even if they have developed adequate IEPs, failure to prepare for litigation can result in an adverse holding. Indeed, in response to one such case, an article published in the Education Law Reporter warned that substantive legal compliance may not be enough to ensure victory in judicial proceedings, and that school districts also must invest considerable time and resources specifically in preparation for litigation. Allan G. Osbourne, Jr., *Proving That You Have Provided a FAPE Under IDEA*, 151 Educ. L. Rep. 367 (2001).[14] Petitioners are simply wrong when they assume that the costs of litigation are not significant so long as adequate IEPs are developed in the first place. *See* Pet. Br. at 44.

According to some commentators, the increasing costs of administration and litigation under the IDEA are already draining resources from core education programs. *See* Marie Gryphon & David Salisbury, *Escaping IDEA: Freeing Parents, Teachers, and Students Through Deregulation and Choice* 1 (Cato Inst. Policy Analysis no. 444) (2002); Krahmal, *supra*, at 220. Thus, even now, students are feeling the pinch of school budgets strained by litigation costs.

3. Shifting the burden of proof to schools would increase not only the frequency of litigation over IEPs, but also the costs associated with that litigation. In order to carry the burden of proof in some increased number of IEP cases, schools would be compelled to incur heftier lawyer and expert fees, and to absorb even more teacher and administrator time away from regular duties.

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[14] One special education teacher has reported spending 75 hours preparing for a single due process hearing. Kirlin, *supra*, at 73.

Perhaps most troubling, under revisions made to IDEA in 2004, the special education and related services provided in an IEP must be "based on peer-reviewed research to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). As a practical matter, experts continue to debate the effectiveness of many treatments for specific disabilities. An especially contentious debate, for instance, has grown up around therapies for autistic children. Because there is little established scientific information on the underlying causes of autism, experts have continued to disagree about the most effective therapy, and new and unproven therapies are emerging all the time. *See* Nancy Reid, *Unproven Therapies for Autism*, (Aug. 10, 2004), http://health.yahoo.com/ency/healthwise/ue4928 (last visited June 23, 2005). But while many experts have remained skeptical, many parents of children with disabilities have remained hopeful, and have clung to nontraditional forms of therapy such as gymnastics, yoga, dolphin therapy, and horseback riding therapy. Stephanie Horvath, *Horses, Dolphins, Yoga, Tumbling Nudge Kids Along*, Palm Beach Post, May 1, 2005, at 1F.[15]

In cases like these, IDEA's new emphasis on peer-reviewed research means that expert testimony will increasingly take center stage, much as it did in this case. Requiring school districts to carry the burden of proof threatens to turn these hearings into battles of the experts, akin to full-blown *Daubert* contests. School districts will not only have to present expert testimony demonstrating the adequacy of their proposed therapies based on peer-reviewed research, but as a practical matter, they may often be forced to hire additional experts who are qualified to question the appropriateness of the therapies proposed by parents' experts. Because so many different types and degrees of disabilities are found in the student population, and new and untested therapies are constantly emerging, schools will be forced to rely on a myriad of experts in different fields of therapy. The costs associated with hiring and preparing those experts so that they can carry the burden of proof for schools would be enormous.[16]

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[15] The Director of Florida Atlantic University's Center for Autism and Related Disabilities, Jack Scott, observed that parents have often opted for untested and expensive alternative therapies in lieu of traditional behavioral therapy: "It hurts when we see families who rush to every new therapy but bypass the most basic teaching out there." *Id.*

Carrying the burden of proof would be particularly onerous for schools for procedural reasons, as well. In practice, parents may provide very little information to schools at the start of the hearing process, making it difficult or impossible for schools to engage in cost-effective preparation. Although parents are required to disclose their objections and proposed remedies when they file a complaint under the IDEA, they need not provide substantial detail or specificity. *See* S. Rep. No. 108-185, at 34 (2003) ("The committee does not intend for a notice of a due process complaint to reach the level of specificity and detail of a pleading or complaint filed in a court of law."). Indeed, parents have even been allowed to proceed with due process hearings after filing complaints that stated only that "Child was denied FAPE." *Id.* Forced to guess at the specific issues in dispute and wary of the costs that may result from an adverse determination, school districts often have no choice but to "overprepare" for the litigation – thus wasting significant public resources.[17]

Those costs are severe enough when parents are charged with carrying the burden of proof; they only become more substantial, and less justifiable, if the burden is shifted to schools.

II. IDEA'S PROCEDURAL SAFEGUARDS ENSURE A LEVEL PLAYING FIELD.

It is not the case, as petitioners contend, that parents will be unfairly disadvantaged under the standard rule placing the burden of proof on the complaining party. The IDEA establishes a fair procedural framework for resolving disputes in which both parents and school systems are equally capable of advancing their respective visions of what is appropriate for the child. Indeed, to combat any perceived natural advantage school officials might have, Congress "incorporated [into the IDEA] an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." *School Comm. of Burlington*, 471 U.S. at 368. *See also Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (1982) (noting "elaborate and highly specific procedural safeguards" and commenting that Congress emphasized "procedures giving parents and guardians a large measure of participation at every stage of the administrative process"). These procedural safeguards mitigate any inherent information or resource advantages enjoyed by schools by keeping the parents involved, informed, and empowered throughout the entire process of planning their children's educations. As a result, school systems have no unfair advantage that would require a shifting of the burden of proof to the school system in parent-initiated administrative hearings.

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[16] Similar issues may arise in other contexts as well. In the 2004 Amendments, Congress permitted greater flexibility in the methods of evaluation used to identify children with "specific learning disabilities." *See* 20 U.S.C.§ 1414(b)(6). As a result, administrative hearing officers and courts could face a *Daubert*-like battle on this front as well, with parents and schools relying on competing evaluative methods to determine whether a child is eligible for services under the IDEA.

[17] A recent Missouri case exemplifies the position of many school districts facing litigation. The school district requested disclosure of the parents' complaints in order to mediate an agreeable solution. The parents refused the request at this early stage and continued to do so even as they initiated an administrative hearing. On the first day of the hearing, the parents articulated specific complaints and continued to express additional concerns throughout the proceeding, asserting that it was the hearing panel's responsibility to identify issues for the parent. *Hearings, supra*, at 72-73.

The IDEA's procedural safeguards strongly encourage parents to involve themselves in the initial development of their child's IEP. Under the Act, parents have the right to be members of their child's IEP team. 20 U.S.C. § 1414(d). They have the right to fully participate in meetings concerning the IEP. *Id.* § 1415(b)(1). They have the right to examine all records used by the school system to develop the IEP. *Id.* They have the right to request an independent evaluation of their child at the public's expense. *Id.*; 34 C.F.R. § 300.502(b). They also have the right to receive a written notice from the LEA explaining in detail the basis for any proposed or refused action. 20 U.S.C. § 1415(c).[18] In short, the IDEA's procedural safeguards ensure that parents are active participants in the process. By encouraging such parental involvement, the IDEA seeks to resolve disputes before they arise.

If a dispute should arise, these same procedural safeguards also prepare parents to effectively challenge the school system. As the Fourth Circuit found, "[b]y the time the IEP is finally developed, parents have been provided with substantial information about their child's educational situation and prospects." Pet. App. at 11. Armed with this information, parents are in an excellent position to appreciate the issues at stake, vocalize their concerns, and advocate for changes to the IEP.

When a dispute escalates to the point of requiring a formal resolution, the IDEA attempts to forestall full-blown adversarial administrative hearings – a more formal setting in which parents may perceive themselves to be at a disadvantage – by providing parents with a voluntary mediation option that is funded by the state. *See* 20 U.S.C. § 1415(e)(1). In addition, the IDEA establishes a separate state complaint process to remedy school district violations of IDEA requirements. *See* 34 C.F.R. § 300.660. Under these procedures, parents may opt to submit a formal complaint to the state, and the state is legally required to investigate and resolve the issue within sixty days. *Id.* § 300.661. Parents have frequently used both of these procedures with success. In addition to the 6,763 due process cases initiated during the 1998-1999 school year, 6,360 state complaints were filed and 4,266 cases were submitted for mediation. *Procedural Safeguards*, *supra*, 7 & A-1.

As of July 2005, the IDEA will require resolution sessions as yet another means of reducing the number of formal due process hearings. *See* 20 U.S.C. § 1415(f)(1)(B). Designed to be non-adversarial meetings between parents and school systems, these resolution sessions will provide parents with the opportunity to discuss their concerns and seek out agreeable settlements. Under the Act, resolution sessions will be required before the start of any formal due process hearing unless both the parents and the school system agree to either waive the session or use the mediation process. *Id.* § 1415(f)(1)(B)(i)(IV). The non-adversarial nature of these resolution sessions will be reinforced by a provision of the IDEA prohibiting the school system from bringing an attorney to the meeting unless the parents opt for an attorney first. *Id.* § 1415(f)(1)(B)(i)(III). If the meetings are successful and the parents and the school system reach a settlement, then a legally binding written agreement must be executed. *Id.* §

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[18] This notice must contain: "(A) a description of the action proposed or refused by the agency; (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; (C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part, and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; (D) sources for parents to contact to obtain assistance in understanding the provisions of this part; (E) a description of other options considered by the IEP Team and the reason why those options were rejected; and (F) a description of the factors that are relevant to the agency's proposal or refusal." 20 U.S.C. § 1415(c)(1).

1415(f)(1)(B)(iii). Both parties, however, have three business days to void any such agreement. *Id.* § 1415(f)(1)(B)(iv). If the school system cannot resolve the parents' complaint within thirty days, then the parents may still proceed to a due process hearing. *Id.* § 1415(f)(1)(B)(ii).

In the event that a full-blown due process hearing cannot be avoided, the IDEA affords parents still more procedural safeguards. It requires the school system to provide a response to the parents' due process complaint within ten days of receiving it. *Id.* § 1415(c)(2)(B). If the complaint raises new issues that were not addressed in the LEA's prior written notices (*see supra*, n.18), then the LEA must prepare a similarly detailed response to the complaint. *Id.* § 1415(c)(2)(B)(i)(I). If no new issues are raised, the LEA must provide a response that "specifically addresses the issues raised in the complaint." *Id.* § 1415(c)(2)(B)(ii). The IDEA further requires the school system and the parents to give each other five days advance notice of the evidence that will be presented at the hearing. 34 C.F.R. § 300.509(a)(3). It also compels the school system to notify the parents "of any free or low-cost legal . . . services available in the area." *Id.* § 300.507(a)(3). If the parents prevail at the hearing, it requires that they be awarded reasonable legal fees. 20 U.S.C. § 1415(i)(3)(B). By providing these special discovery rules and assurances of financial recovery, the IDEA empowers parents to effectively challenge a school system in an administrative hearing.

The IDEA not only establishes these procedural safeguards, but also promotes their use. Under the Act, school systems are required to provide parents with written notice about their rights at key moments, such as when the child is initially referred for evaluation or the parents first file a complaint. *Id.* § 1415(d)(1)(A). These written notices must contain "a full explanation of the procedural safeguards, written in a native language of the parents . . . [and] in an easily understandable manner." *Id.* § 1415(d)(2). The Act also authorizes the establishment of parent training and information centers, which are centers designed, at least in part, to "assist parents to understand the availability of, and how to effectively use, [the IDEA's] procedural safeguards . . . ." *Id.* § 1471(b)(8). In short, the IDEA goes well beyond simply granting parents rights. Rather, by repeatedly informing parents of the existing procedural safeguards, the IDEA affirmatively encourages parents to invoke those rights.

With all of these procedural safeguards in place – safeguards that involve, inform, and empower parents from the very beginning of the process –"the school system has no unfair information or resource advantage" in due process hearings. Pet. App. at 11-12. As the Fourth Circuit recognized, "Congress has taken steps . . . that level the playing field" between schools and parents in IDEA disputes. *Id.* at 9. Consequently, it is unnecessary to assign the burden of proof to the school system in the name of fairness.

* * *

Given the magnitude of the educational costs associated with petitioners' reading of the statute, and the degree to which it would be inconsistent with Congress' intent to reduce litigation and protect educational outcomes for all children, the Court should adopt that reading only if compelled to do so by unambiguous statutory text. In this case, however, there is no such legislative directive; the statute simply does not address the burden of proof. Sound educational policy and all indicia of congressional intent, on the other hand, point clearly to the traditional default rule: the burden of proof should remain with the complaining party.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

PAMELA HARRIS
SHANNON PAZUR
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006
(202) 383-5300

JULIE WRIGHT HALBERT
COUNCIL OF THE GREAT CITY SCHOOLS
1301 Pennsylvania Avenue, NW, Suite 702
Washington, D.C. 20004
(202) 394-2427

Attorneys for Amici Curiae

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In the Supreme Court of the United States

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS

v.

JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

KENT D. TALBERT
Acting General Counsel
Department of Education
Washington, D.C. 20202

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General

DAVID B. SALMONS
Assistant to the Solicitor General

MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.*, when parents initiate an administrative "due process" hearing to seek reimbursement for private-school tuition and challenge their child's individualized education program, the burden of proof falls on the parents or the school district.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the allocation of the burden of proof in administrative "due process hearings" under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, in which parents challenge the adequacy of a school district's proposed individualized education program (IEP) and seek reimbursement for private-school tuition. The Department of Education administers the IDEA, and has authority to promulgate regulations necessary to ensure compliance with the Act. See 20 U.S.C. 1417. In addition, to obtain financial assistance under the IDEA, a State must satisfy the Secretary of Education that it "has in effect policies and procedures to ensure that it meets" the Act's requirements, including those relating to administrative due process hearings. See 20 U.S.C. 1412(a). Accordingly, the United States has a significant interest in the proper resolution of the question presented.

STATEMENT

1. The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, establishes a cooperative program under which the federal government makes grants to participating States to assist them in providing public education to children with disabilities. See generally 20 U.S.C. 1400(d).[1] Maryland participates in the IDEA program, and its public school districts and officials must comply with the Act's requirements in the administration of the program within the State.

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[1] On December 3, 2004, Congress amended the IDEA; however, the amendments do not take effect until July 1, 2005. See Pub. L. No. 108-446, 118 Stat. 2646. Unless otherwise indicated, citations are to the statute as it existed prior to the 2004 Amendments. A copy of the amended provisions is attached to petitioners' brief.

a. Under the IDEA, a State participating in the grant program must ensure that each disabled child receives a "free appropriate public education," which includes special-education services necessary to meet the child's particular needs. 20 U.S.C. 1400(d)(1)(A), 1412(a)(1)(A). The Act requires local school systems to develop an individualized education program (IEP) for each disabled child in accordance with statutory requirements. See 20 U.S.C. 1412(a)(4). The IEP is developed by an "IEP team," which consists of representatives of the local school system (including the child's teacher and a special education teacher), the child's parents, and, where appropriate, the child. 20 U.S.C. 1414(d)(1)(B).

The IDEA further requires state educational agencies receiving federal funds to "establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies." 20 U.S.C. 1415(a). Although the Act grants States substantial discretion over the precise contours of the procedural safeguards to be provided, it mandates a number of specific safeguards that States must include in those procedures. Those procedures, for example, must provide "an opportunity to present complaints [to the state or local educational agency] with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6). The parents' complaint must contain, *inter alia*, "a description of the nature of the problem of the child relating to [the IEP], including facts relating to such problem," and "a proposed resolution of the problem to the extent known and available to the parents at the time." 20 U.S.C. 1415(b)(7)(B)(ii) and (iii).

When such a complaint is filed, "the parents involved * * * shall have an opportunity for an impartial due process hearing." 20 U.S.C. 1415(f)(1). At any such hearing, *both* the school and the parents must be accorded certain rights, including "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities"; "the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"; "the right to a written, or, at the option of the parents, electronic verbatim record of such hearing"; and "the right to written, or, at the option of the parents, electronic findings of fact and decisions." 20 U.S.C. 1415(h)(1)-(4). The statute does not specify whether the burden of proof at the hearing falls upon the parents or the school system.

If a State elects to have the local educational agency conduct the hearing, any aggrieved party can appeal the decision to the State educational agency. 20 U.S.C. 1415(g). A party aggrieved by a decision at the final State administrative stage has a right to "bring a civil action with respect to the complaint" in federal district court or "any State court of competent jurisdiction." 20 U.S.C. 1415(i)(2)(A). Congress specified that courts should decide such cases based on "the preponderance of the evidence," but did not specify which party bears the burden of proof in state or federal court. 20 U.S.C. 1415(i)(2)(B)(iii).

b. In 2004, Congress reauthorized and amended the IDEA, in substantial part to coordinate the Act's requirements with the substantial reform and accountability measures adopted in the No Child Left Behind Act of 2001 (NCLB), 20 U.S.C. 6301, *et seq.*; see Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), Pub. L. No. 108-446 (effective July 1, 2005). The NCLB is a comprehensive education reform law designed to ensure that a high-quality education program is provided to all students in public elementary and secondary schools, including students with disabilities. It requires States to adopt challenging academic content and achievement standards for all students in public schools, 20 U.S.C. 6311(b)(1); carry out annual assessments aligned to those academic standards to measure the progress of all students, including those with disabilities, 20 U.S.C. 6311(b)(3); and develop a single, statewide accountability system that holds all local educational agencies and public schools accountable for making "adequate yearly progress" in achieving the State's academic standards—including performance with regard to students with disabilities, 20 U.S.C. 6311(b)(2).

The 2004 IDEA Amendments reinforce the accountability provisions of NCLB by, *inter alia*, requiring that States establish "goals for the performance of children with disabilities" that "are the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities," 20 U.S.C. 1412(a)(15)(A)(ii), and requiring that all "children with disabilities are included in all general State and districtwide assessment programs, including the assessments" required by the NCLB, 20 U.S.C. 1412(a)(16)(A). Moreover, the IDEA Amendments expressly incorporate the NCLB's standards for measuring the educational progress of children with disabilities and require that each State "establish[] goals for the performance of children with disabilities" that are "the same as the State's definition of adequate yearly progress" under the NCLB. 20 U.S.C. 1412(a)(15). And Section 1412(a)(15)(B) of the IDEA as amended now requires States to establish "performance indicators" to use towards measuring the progress towards achieving those goals, "including measurable annual objectives for progress by children with disabilities under [the NCLB]." *Ibid.*

These amendments "carefully align[] the IDEA with the accountability system established under NCLB to ensure that there is one unified system of accountability for States, local educational agencies and schools." S. Rep. No. 185, 108th Cong., 1st Sess. 17-18 (2003). Consistent with that stated goal, the 2004 IDEA Amendments also reaffirm and buttress the notice pleading approach to due process hearings under the IDEA, expressly limit the scope of the hearing to those issues raised in the complaint, impose a limitations period for filing a complaint, and seek to encourage cooperation and reduce litigation over the contents of an IEP. See Part I.B., *infra*.

2. a. Petitioners Brian Schaffer and his parents filed this action under the IDEA against the Montgomery County Board of Education and its Superintendent, alleging that the school system's IEP failed to provide him with a "free appropriate public education" as required under the Act. Brian, who has Attention Deficit Hyperactivity Disorder and other learning disabilities, attended private school until seventh grade, when school personnel informed him that he needed to attend a school that could better accommodate his disabilities. Pet. App. 3.

At his parents' request, Montgomery County Public Schools (MCPS) evaluated Brian, determined that he was eligible for special education, and offered his parents a proposed IEP for the next school year. Pet. App. 3-4. After Brian's parents objected to the class size at the local middle school, MCPS offered to provide the same IEP services at a different middle school, which was ten minutes from Brian's home and which had smaller classes. *Id.* at 4. Brian's parents believed that the IEP was still inadequate and decided to send Brian to private school. The parents also requested a due process hearing under the IDEA and sought to require MCPS to pay for their son's private school tuition. *Ibid.*

b. Under Maryland law, due process hearings are conducted by administrative law judges (ALJs). Pet. App. 4. At the hearing, the ALJ held that the parents bore the burden of proving that the IEP failed to provide their son a "free appropriate public education"; that the parents failed to satisfy that burden; and that "'the assignment of the burden of proof [was] critical' to the outcome." *Id.* at 4-5.

The parents then filed suit in federal court. The district court concluded that the IDEA mandates that schools bear the burden of proof regardless of which party initiates the due process hearing and remanded the case to the ALJ for further proceedings. Pet. App. 5. The MCPS appealed, but while the appeal was pending, the ALJ on remand reassigned the burden of proof to the school system and found that MCPS had failed to prove that its IEP was adequate. *Ibid.* The court of appeals then vacated the district court's original decision and "remand[ed] to that court with directions that any issue with respect to the proof scheme in this case be consolidated with consideration of the merits." *Id.* at 5-6. In accordance with that order, the district court reaffirmed its previous holding that the school system had the burden of proof, and held on the merits that the proposed IEP was inadequate.[2]

3. A divided panel of the Fourth Circuit reversed. Noting that the IDEA does not expressly assign the burden of proof at the administrative hearing, the court held that where a "statute is silent, the burden of proof is normally allocated to the party initiating the proceeding and seeking relief." Pet. App. 6. That rule applies to numerous other federal remedial statutes such as Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA), which are similarly silent with respect to the assignment of the burden of proof, and the court found no legitimate basis for distinguishing the IDEA from these other remedial statutes. *Id.* at 8.

The court rejected the parents' argument that the burden of proof should fall on the school system because of its greater expertise and resources, observing that the "side with the bigger guns" does not automatically bear the burden of proof, and that "very often a party must plead and prove matters as to which his adversary has superior access to the proof." Pet. App. 9 (quoting 2 John W. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Congress recognized that a school system would have certain advantages in disputes over a child's education, and accordingly implemented numerous procedural safeguards in the IDEA to ensure parents' ability to participate meaningfully in the process of developing an IEP. *Id.* at 10. As a result of these safeguards, the court explained, the "school system has no unfair information or resource advantage that compels us to reassign the burden of proof." *Id.* at 11-12.

The court also reasoned that assigning the burden of proof to the school system would contradict "a basic policy of the IDEA, which is to rely upon the professional expertise of local educators." Pet. App. 14. And although Congress provided extensive procedural safeguards to ensure meaningful parental involvement, "assignment of the burden of proof * * * was not one of them." *Id.* at 16. The court therefore held that the parents have the burden of proof when they challenge the adequacy of an IEP in administrative proceedings under the IDEA.

Judge Luttig dissented. Pet. App. 16-20. He reasoned that the school system not only has greater resources than the parents, but also "has better access to information, greater expertise, and an affirmative obligation to provide the contested services," and that the "collective weight" of these factors favored allocating the burden of proof to the school. *Id.* at 20.

SUMMARY OF ARGUMENT

Traditional rules governing the allocation of the burden of proof, the interpretation of Spending Clause legislation, and the text, structure, and purposes of the IDEA support placing the burden of proof on the party that initiates and seeks

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[2] In August 2000, the United States filed an amicus brief in the Fourth Circuit in support of the parents' position that the burden of proof should fall on the school system. The United States did not participate in any further proceedings in the case, including the 2004 proceedings before the court of appeals that resulted in the opinion that is currently before this Court. In determining eligibility for funds, the Secretary has not reviewed whether States placed the burden of proof on the party, including parents, seeking relief at the hearing. See 20 U.S.C. 1412(a)(6). After careful review of its administrative practice, the relevant case law, and the text, structure and history of the IDEA, including the 2004 Amendments to the Act, the government is now of the view that, where, as here, a State has not placed the burden of proof on school districts as a matter of state law, the traditional rule that the burden of proof falls on the party seeking relief applies to IDEA due process hearings.

relief at the administrative due process hearing under the Act. Here, that party is the parents, who initiated and sought relief at the hearing and who alleged that school officials failed to comply with their legal obligations in formulating the IEP.

a. Two well established legal rules support placing the burden of proof on the parents in this case. The first is that, absent a contrary indication of legislative intent, the "traditional rule" applies and requires that the party seeking relief bears the burden of persuasion. Pet. App. 6 (citing, *inter alia*, 2 John W. Strong, *McCormick On Evidence* § 337, at 412 (5th ed. 1999)). That traditional allocation of the burden of proof applies to numerous analogous remedial statutes—such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and Section 504 of the Rehabilitation Act—as well as to claims in administrative hearings by benefits claimants under any number of important federal programs governed by the Administrative Procedure Act (APA). The second is that public officials, including public school officials, are presumed to act in good faith compliance with their legal obligations. Thus, where, as here, a party alleges that those officials violated their legal duties, the complaining party generally bears the burden of proof.

b. In addition, unless state law provides for a different result, longstanding principles governing Spending Clause legislation, such as the IDEA, support applying the traditional rule in this context. Neither the statute nor the agency, either by regulation or administrative practice, has conditioned the receipt of federal funds on the adoption by States of a modification to the traditional allocation of the burden of proof. There is no basis to read into this legislative and administrative silence a requirement that States alter their rules so that schools at all times bear the burden of persuasion. At the same time, there is nothing prohibiting a State receiving funds under the Act from going beyond the

statutory baseline and imposing the burden of proof on schools as a matter of *state* law.

c. While the IDEA does not specifically address the issue, several aspects of the statute support placing the burden of proof where it presumptively lies—on the party initiating and seeking relief at the administrative hearing. The Act, for example, establishes a traditional pleading regime similar to those common in civil and administrative litigation, under which the complaining party must identify its affirmative case and request particular relief. Such a pleading regime strongly suggests that Congress intended the traditional allocation of the burden of proof to apply. See 2 John W. Strong, *McCormick on Evidence* § 337, at 411 (5th ed. 1999). The Act's general deference to the decisions of educational professionals, its presumption in favor of the child's status quo educational placement, and the amendments to the Act adopted in 2004 to limit litigation and encourage cooperation with respect to the adoption and implementation of IEPs, all support this conclusion.

d. Finally, petitioners' policy arguments do not support deviating from the traditional allocation of the burden of proof in IDEA administrative hearings. As this Court noted in both *Board of Education* v. *Rowley*, 458 U.S. 176, 206-207 (1982), and *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), Congress addressed policy concerns through the IDEA's *procedural* safeguards, and, accordingly, it would be inappropriate to impose a substantive standard of review not found in the Act based on such concerns. Moreover, none of petitioners' policy arguments distinguishes the IDEA from the numerous other remedial statutes and administrative contexts in which the traditional allocation of the burden of proof undisputedly applies.

ARGUMENT

THE IDEA SHOULD BE READ TO PLACE THE BURDEN OF PROOF ON THE PARTY INITIATING AND SEEKING RELIEF AT AN ADMINISTRATIVE HEARING UNDER THE ACT

The question presented in this case—whether the parents or the school district bears the burden of proof when the parents initiate an administrative "due process" hearing to challenge a school's individual education plan, or IEP, pursuant to Section 1415(f) of the IDEA—is a narrow one that should affect only a small number of cases under the IDEA. As this Court noted of a similar burden of proof question in *Director* v. *Greenwich Collieries*, 512 U.S. 267 (1994), "burden of proof" in this context refers to the "burden of persuasion—the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Id.* at 272.

The number of cases truly in equipoise is unlikely to be particularly large. Moreover, because there are no provisions for motions for summary judgment at the administrative level, both parties will always have a fair and equal chance to present their best case to the trier of fact. Accordingly, regardless of which party bears the burden of proof, both the parents and the school have ample incentive to develop and present their best evidence, including submissions from medical and educational experts. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 209 (1982) ("[P]arents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act."). Nevertheless, the question is important, in part, because in order to continue to receive funding under the IDEA, States must satisfy the Secretary that their policies and procedures, including those for due process hearings, meet the Act's requirements. See 20 U.S.C. 1412(a)(6).

For the reasons set forth herein, traditional rules governing placement of the burden of proof and the text, structure, and purposes of the IDEA support placing the burden of proof on the party that initiates and seeks relief at the administrative due process hearing. When the school is the complainant at the administrative hearing, it should bear the burden of proof. But where, as here, parents initiate the hearing, seek relief, and allege that school officials failed to comply with their legal obligations in formulating the IEP, that burden should rest with the parents.

A. Both The Traditional Rule That The Party Seeking Relief Bears The Burden Of Proof And The Presumption Of Regularity That Attaches To Actions Of Public Officials Support Placing The Burden On The Party Seeking Relief Under The IDEA

1. Under the IDEA, Congress set forth "elaborate and highly specific procedural safeguards" to ensure that parents can participate meaningfully in the development of IEPs and that they have access to administrative and judicial review when they believe a school system's proposed IEP is inadequate. See *Rowley*, 458 U.S. at 205. Congress further charged state educational agencies with the responsibility for adopting additional "procedural safeguards" consistent with those set forth in the Act to ensure that children with disabilities receive a free appropriate public education. 20 U.S.C. 1415(a). Congress has not, however, specified who bears the burden of proof in an administrative due process hearing under the Act. See Pet. App. 6.

As the majority below correctly recognized, where, as here, Congress is silent on the issue, the starting point in determining the allocation of the burden of proof is the "traditional rule" that the party seeking relief bears the burden of persuasion. Pet. App. 6 (citing, *inter alia*, 2 John W. Strong, *McCormick On Evidence* § 337, at 412 (5th ed. 1999)); see generally 29 Am. Jur. 2d Evidence § 158 (1994) ("Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his cause of action."); 21 Charles W. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure Evidence* § 5122, at 555-556 (1977) ("[T]he usual rule is that the burden of proof is on the plaintiff."); 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 63, at 314 (2d ed. 1994) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burden on the elements of their claims."). See, *e.g.*, *Bull* v. *United States*, 295 U.S. 247, 260 (1935) (holding "burden of proof" is "normally on the claimant"); *Arthur* v. *Unkart*, 96 U.S. 118, 122 (1877) ("The burden of proof is upon the party holding the affirmative of the issue.").

This traditional rule generally applies even to remedial anti-discrimination statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Rehabilitation Act. See, *e.g.*, *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 511 (1993) (despite shifting burdens of production, "Title VII plaintiff at all times bears the ultimate burden of persuasion"); *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (1993) (ADEA); *Dvorak* v. *Mostardi Platt Assoc.*, 289 F.3d 479, 485 (7th Cir. 2002) (ADA); *Williams* v. *Widnall*, 79 F.3d 1003, 1005 & n.3 (10th Cir. 1996) (Section 504 of the Rehabilitation Act).[3]

The traditional rule that the party initiating the proceedings and seeking relief bears the burden of persuasion also expressly applies to federal administrative agency proceedings under the APA, 5 U.S.C. 556(d), in which the benefit claimant generally bears the burden of persuasion. See *Director* v. *Greenwich Collieries*, 512 U.S. 267, 271 (1994) (holding that APA requires burden of persuasion as well as production be placed on benefit claimant initiating administrative hearing). Thus, as this Court held in *Greenwich Colleries*, 512 U.S. at 281, even in the face of a contrary administrative rule, in any administrative hearing covered by the APA, the traditional rule requires that "when the evidence is evenly balanced, the benefits claimant must lose."

Congress, of course, is presumed to have understood such well settled legal principles at the time it enacted the IDEA. See *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). Neither the text nor history of the IDEA suggests that Congress intended to deviate from the presumption that the burden lies on the party seeking relief. Rather, as discussed in Part I.B., *infra*, several features of the Act indicate that Congress intended the same burden of proof to apply to administrative hearings under the IDEA as applies to claims under similar civil rights statutes and to administrative hearings initiated by claimants for a variety of important federal benefits under the APA. But even aside from those indications of congressional intent, the lack of *any* expression by Congress of an intent to deviate from the traditional allocation of the burden of proof in IDEA administrative hearings is itself sufficient to conclude that the burden of persuasion rests on the party initiating the hearing and requesting relief.

That is particularly true in light of the fact that Congress knows how to depart from the traditional rule when it so desires. See, *e.g.*, 38 U.S.C. 5107 (providing that a claimant for veteran's benefits must "present and support a claim for benefits," but that "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant"); 8 U.S.C. 1186b(c)(3)(D) (placing burden of proof on Attorney General in proceeding initiated by alien challenging termination of

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[3] Some questions have arisen under the ADA and Section 504 of the Rehabilitation Act as to whether certain issues are in fact affirmative defenses (and therefore impose a burden of proof on the party asserting the defense). See *Borkowski* v. *Valley Cent. Sch. Dist.*, 63 F.3d 131, 137-138 (2d Cir. 1995) (undue hardship); *Branham* v. *Snow*, 392 F.3d 896, 906-907 (7th Cir. 2004) (direct threat); but cf. *Barth* v. *Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994). Here, however, the IDEA specifies the requirements for the contents of the parents' complaint, and there is no suggestion that any aspect of the complaint could properly be considered an affirmative defense.

permanent resident status); 25 U.S.C. 450j-1(l) (assigning burden of proof to agency in hearings challenging agency's withholding of funds owed to Indian tribe under self-determination contract).

2. The conclusion that the traditional allocation of the burden of proof applies to administrative hearings under the IDEA is further supported by a second, equally settled legal principle: the presumption of administrative regularity afforded to government conduct. This Court has repeatedly held that "in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties." *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States* v. *Chemical Found. Inc.*, 272 U.S. 1, 14-15 (1926)); accord *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001); *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983). As this Court explained in *Armstrong*, the presumption of regularity "rests in part on an assessment of the relative competence" of administrators and courts, as well as on important separation-of-powers concerns. 517 U.S. at 465.

This Court has long recognized that, absent a contrary legislative indication, the presumption of regularity supports placing the burden of proof on the party alleging that public officials failed to comply with their legal obligations. In *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350, 352 (1918), for example, this Court considered an equal protection claim under the Fourteenth Amendment to a state board of tax assessors' assessment of property. Of particular relevance to the present case, the Court unanimously declared that "[t]he good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party." *Id.* at 353.

The good faith of public school officials and the validity of their actions are equally subject to the presumption of regularity. See, *e.g.*, *Rowley*, 458 U.S. at 206 (noting that IDEA

"is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review"); *Mitchell* v. *Helms*, 530 U.S. 793, 863-864 (2000) (O'Connor, J., concurring) ("[I]t is entirely proper to presume that * * * school officials will act in good faith."); *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975) ("By and large, public education in our Nation is committed to the control of state and local authorities.") (quotation omitted); see also *Agostini* v. *Felton*, 521 U.S. 203, 223-224 (1997). As with the challenge to the tax assessment in *Sunday Lake Iron Co.*, it necessarily follows from that presumption of regularity that "the burden of proof is upon the complaining party" challenging the actions of public officials—in this instance, the parents, who initiated the due process hearing by alleging in their complaint that school officials failed to comply with their obligations under the IDEA.[4]

The IDEA recognizes this presumption of regularity and entrusts important functions to state and local educational professionals to ensure that children with disabilities are identified and receive a free and appropriate public education. As this Court explained in *Rowley*, "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child." 458 U.S. at 207; see *id.* at 208 (concluding that Congress shared the view "that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy,'" and that, accordingly, "Congress's intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped"). Assignment of the burden of proof to parents or other parties who challenge the validity of an IEP would best reflect Congress's intent to rely primarily on the professional judgment and experience of state and local educators. As the court below recognized, to hold otherwise and "say that the schools system should lose [if no evidence is presented] is to say that every challenged IEP is presumptively inadequate." Pet. App. 14. Such a presumption of *ir*regularity finds no support in the text or history of the IDEA.[5]

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[4] In other contexts where this Court has recognized a presumption of regularity, it has always placed the burden of proof on the party alleging that public officials acted inconsistent with that presumption. See, *e.g.*, *Parke* v. *Raley*, 506 U.S. 20, 29 (1992) (holding that placing burden on government of proving validity of even an uninformed guilty plea challenged on collateral attack "would * * * improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights") (citing *Johnson* v. *Zerbst*, 304 U.S. 458, 468-469 (1938)); *United States* v. *R. Enters.*, 498 U.S. 292, 305 (1991) (explaining that placing burden on subpoenaed witness of establishing that compliance with subpoena would be unreasonable or oppressive "accords * * * with the presumption of regularity that attaches to grand jury proceedings").

B. Principles Governing Spending Clause Legislation Also Support Applying The Traditional Rule For Allocating The Burden Of Proof, Absent Contrary State Law

This Court should be particularly reluctant to find any implicit congressional intent to override the traditional allocation of the burden of proof and the presumption of regularity in this context, because the IDEA is Spending Clause legislation that conditions federal financial assistance on compliance with the Act's requirements. See *Rowley*, 458 U.S. at 190 n.11 & 204 n.26; *Cedar Rapids Comm. Sch. Dist.* v. *Garrett F.*, 526 U.S. 66, 83 (1999) (Thomas, J., joined by Kennedy, J., dissenting) ("[b]ecause IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction"). Given this Court's repeated admonition that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," *Barnes* v. *Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981)), it would be anomalous to hold that, in the face of legislative and regulatory silence, the IDEA, through its silence, conditions federal funds on the requirement that States modify their rules and shift the burden of proof in all instances onto their schools.

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[5] Petitioners' reliance on *Keyes* v. *School District No. 1*, 413 U.S. 189, 208 (1973), and its analogy to circumstances in which "school authorities have been found to have practiced purposeful segregation in part of a school system" is misplaced. An IDEA administrative complaint involves only an *allegation* that school officials have violated their legal obligations, not a judicial determination that they have done so. A presumption that schools should be treated with the same skepticism as an adjudicated violator is unwarranted and inconsistent both with the plain terms of the Act, which entrust numerous important responsibilities to state and local educational institutions, and with this Court's decisions in *Rowley*, 458 U.S. at 206-207, and *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), which make clear that Congress extended substantial deference to the educational determinations of school officials.

Neither Congress, nor the Department of Education in applicable regulations, has required States to impose the burden of proof on their local school districts when parents challenge IEPs, and the Department of Education has not reviewed the placement of the burden of proof in determining eligibility for funds. Courts should therefore refrain from imposing a requirement on the States that they modify their rules to provide that the school district always bears the burden of proof. Thus, where, as here, state law does not specifically allocate the burden of proof in IDEA proceedings, the court of appeals correctly held that the traditional rule that the party seeking relief bears the burden of proof informs the federal statutory baseline. At the same time, however, nothing in the Act or applicable regulations prevents a State from going beyond what the IDEA requires and imposing a burden of proof on its school systems in administrative hearings.[6] Indeed, courts have held that as a matter of state law, States can impose both substantive and procedural requirements that are more protective of disabled children and their parents than those imposed by the IDEA, so long as such requirements do not conflict with the IDEA. See, *e.g.*, *Kathleen H.* v. *Department of Educ.*, 154 F.3d 8, 10 (1st Cir. 1998); *In re Conklin*, 946 F.2d 306, 308-309 & n.2 (4th Cir. 1991).

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[6] A number of States have adopted rules altering the traditional burden of proof in administrative hearings under the Act. See, *e.g.*, Ala. Admin. Code r. 290-8-9.08(8)(c)(6) (2001); Alaska Admin. Code tit. 4,

C. The IDEA's Text And Structure Support Placing The Burden On The Party Seeking Relief At The Due Process Hearing

Although the IDEA does not speak directly to which party bears the burden of proof at an administrative due process hearing, several features of the Act strongly support placing the burden on the party seeking relief at the hearing.

1. Section 1415 of the IDEA establishes a traditional pleading regime similar to those common in civil and administrative litigation, under which the complaining party must identify its affirmative case and request particular relief. Indeed, before the 2004 Amendments, under the version of the statute directly at issue here, the *only* pleading burden identified in the Act with respect to a due process hearing challenging an IEP was the burden on parents to file a complaint that gives adequate notice to the educational agency of the precise nature of the parents' objections to the IEP, including facts supporting those objections, and the parents' proposed resolution of the problem. See 20 U.S.C. 1415(b)(6) and (7).

The 2004 Amendments clarified or altered several important features of the administrative hearing, all of which reinforce the basic notice pleading design of proceedings.[7] First, the 2004 Amendments clarify that educational agencies, as well as parents, may file a complaint to initiate the administrative hearing. See 20 U.S.C. 1415(f)(1)(A); see also 20 U.S.C. 1415(b)(7)(A), 1415(c)(2); S. Rep. No. 185, 108th Cong., 2d Sess. 29 (2003) ("[L]ocal educational agencies, as well as parents, have the right to present complaints."). There are a number of circumstances in which the school would be the complaining party, such as where the parents object to having their child receive testing to determine whether the child has a disability and needs a special education, or where schools seek to change a child's placement due to a disciplinary issue. When a school files such a complaint, it is subject to the same notice pleading requirements as the parents. See 20 U.S.C. 1415(b)(7)(A)(ii)(I) and (II).

Second, the Amendments make clear that no party may have a "due process hearing" until it complies with the Act's pleading requirement, 20 U.S.C. 1415(b)(7)(B), and that the subject matter of the hearing is generally limited to issues raised in the complaint, 20 U.S.C. 1415(f)(3)(B). Thus, as with a civil complaint, a party's failure to raise issues in its administrative complaint under Section 1415 generally precludes the hearing officer from considering those issues.

Lastly, the Amendments require the school district—"if [it] has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice"—or other "non-complaining party" to file a written response to the complaint within 10 days of receiving the complaint. 20 U.S.C. 1415(c)(2)(B)(i) and (ii). In the response, the agency must explain why it "proposed or refused to take the action raised in the complaint"; describe "other options that the IEP Team considered and the reasons why those options were rejected"; describe "each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action"; and describe the "factors that are relevant to the agency's proposal or refusal." 20 U.S.C. 1415(c)(2)(B)(i)(I)(aa)-(dd). This is a burden of disclosure to account for the absence of discovery, or

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§ 52.550(e)(a) (2002); Del. Code Ann. tit. 14 § 3140 (1999); Minn. Stat. Ann. § 125A.091, subdiv. 16 (West 2004).

[7] Although the pre-2004 version of the IDEA is directly at issue here, the 2004 Amendments, effective July 1, 2005, clarify certain aspects of the IDEA due process hearing and reinforce that the burden—both before and after the 2004 Amendments—is on the complaining party, which here is petitioners.

at most production, which did not exist prior to the 2004 Amendments. Like the IDEA's other procedural requirements, it alleviates the concern that a school system has greater access to relevant information and greater control over the evidence by requiring the school system to give complaining parents full notice and descriptions of its evidence. Significantly, however, it does not require that the burden of *persuasion* fall on the school system. Nor does it require schools to establish the general appropriateness of an IEP or rebut possible objections not actually raised in the complaint. Instead, consistent with pleading practices in myriad civil and administrative proceedings in which the traditional allocation of the burden of proof applies, Congress chose to require schools to respond only to "the subject matter contained in the parent's due process complaint notice." 20 U.S.C. 1415(c)(2)(B)(i).

That the IDEA imposes a pleading regime similar to that applicable to civil and administrative litigation reinforces Congress's intent that the traditional allocation of the burden of proof should apply. As a leading treatise explains: "In most cases, the party who has the burden of pleading a fact will have the burdens of producing evidence and of persuading the jury of its existence as well. *The pleadings therefore provide the common guide for apportioning the burdens of proof.*" 2 John W. Strong, *McCormick on Evidence* § 337, at 411 (5th ed. 1999) (emphasis added); see, *e.g.*, 2 Charles F. Chamberlayne, *A Treatise on the Modern Law of Evidence* § 943 (1911) ("Whichever, of the parties, has the affirmative of the issue as determined by the pleadings, has the burden of proof, to establish his contention by the legally required preponderance of the evidence."). That Congress, as demonstrated by the 2004 Amendments, clearly envisioned that both parents and schools would initiate administrative hearings and imposed undifferentiated pleading requirements on the complainant reflect an intent to place the burden on the complainant. If Congress had intended schools to bear the burden of persuasion in all cases, regardless of which party filed the complaint, then it presumably would have said so explicitly and placed a burden on the school to demonstrate the overall appropriateness of its IEP.

2. Congress's emphasis on procedural safeguards, rather than substantive standards of review, likewise supports the view that Congress intended the traditional allocation of the burden of proof to apply to IDEA administrative hearings. As this Court observed in *School Committee of Burlington* v. *Department of Education*, 471 U.S. 359, 368 (1985), Congress recognized that in any disputes between the school officials and the parents over an IEP, "the school officials would have a natural advantage," and so "Congress incorporated an elaborate set of what it labeled 'procedural safeguards' to insure the full participation of the parents and proper resolution of substantive disagreements." These safeguards include, *inter alia*, the right to be members of the team that develops the IEP (20 U.S.C. 1414(d)(1)(B)); the right to "examine all records relating" to their child, to participate in meetings "with respect to the identification, evaluation, and educational placement of the child," and to obtain an independent educational evaluation of the child (20 U.S.C. 1415(b)(1)); the right to notice whenever the school district changes or refuses to change the child's educational placement (20 U.S.C. 1415(b)(3)); the right to "obtain assistance in understanding" the Act's provisions (20 U.S.C. 1415(c)(7)); the right to mediation (20 U.S.C. 1415(b)(5)); the right to initiate a due process hearing, at which they may be represented by counsel or a non-lawyer, and before which they must receive advance notice of the school system's evidence (20 U.S.C. 1415(f)(1) and (2)); and the right to file a civil action if aggrieved by the decision at the hearing (20 U.S.C. 1415(i)(2)). The fact that Congress omitted any special safeguard related to the burden of proof is strong evidence that none was intended. Cf. *Greenwich Collieries*, 512 U.S. at 280 (noting that Congress demonstrated "solicitude for benefits claimants" and "recognition that such claims * * * might be difficult to prove" through various presump-

tions but was silent on the burden of persuasion and APA's embrace of traditional rule that benefit claimant has burden of persuasion could not be overcome by silence).

That conclusion is confirmed by this Court's decision in *Rowley*, which reaffirms that Congress intended to achieve the goals of the IDEA primarily through the "elaborate and highly specific" procedural safeguards requiring notice and full participation by parents in the IEP process, rather than through mandating a particularly demanding or concrete substantive standard of review. 458 U.S. at 205-208. Thus, the Court concluded that Congress's "emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary [of Education] for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. Just as Congress did not believe it necessary to detail "any substantive standard prescribing the level of education" that States must provide disabled children, *id.* at 189, it did not deem it necessary to prescribe any unique or demanding burden of proof that schools must meet in administrative proceedings in order to achieve the purposes of the Act.

The Court in *Rowley* further warned that "nothing in the Act * * * suggest[s] that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself." 458 U.S. at 206. That admonition is equally applicable here. Petitioner's proposed allocation of the burden of proof is precisely the kind of "substantive standard[] of review which cannot be derived from the Act itself" that this Court referenced in *Rowley*. See, *e.g.*, *Greenwich Collieries*, 512 U.S. at 271 (concluding that allocation of burden of proof is "a rule of substantive law"

inherently intertwined with substantive standard of review); *Raleigh* v. *Department of Revenue*, 530 U.S. 15, 20-21 (2000).

3. Unless a parent objects to a proposed IEP, the IDEA allows the IEP to go into effect. 20 U.S.C. 1415(b)(6) and (7). If a parent initiates a due process hearing to challenge the IEP or seek relief, the Act's so-called "stay put" provisions state that, with certain limited exceptions, unless the school and the parents otherwise agree, "the child shall remain in the then-current educational placement of such child" until the administrative hearing has been completed. 20 U.S.C. 1415(j) and (k).

The fact that the IEP goes into effect absent a decision by the parents to initiate a challenge makes clear that the parents, in such cases, are the party seeking relief who would presumptively bear the burden of proof. The "stay put" provision's automatic stay provision does not alter that fact. Indeed, the stay put provision reinforces the conclusion that the party initiating the hearing bears the burden of proof in two ways. First, Congress could have created a presumption in favor of the parent's preferred option pending the due process hearing, rather than a preference in favor of preserving the status quo. Indeed, if Congress did not assume that school officials would faithfully comply with the Act's substantive requirements, it presumably would have done so.

Second, in the pre-amendment version of Section 1415(k)(2)(A), Congress did in fact place a narrow burden of persuasion on the educational agency when seeking to alter the status quo, thereby demonstrating in the IDEA itself that Congress knows how to place the burden of proof on the school district when it deems it appropriate. That Section, not implicated here, states that a hearing officer may order a change in placement for a disabled child to "an appropriate interim alternative educational setting for not more than 45 days if the hearing officer determines that the public agency *has demonstrated by substantial evidence* that maintaining the current placement of such child is substantially likely to result in injury to the child or to others." 20 U.S.C.

1415(k)(2)(A) (emphasis added). Its presence suggests that the lack of similar language placing the burden of persuasion on the school generally in IDEA administrative hearings was not the product of mistake or inattention, but rather an indication that Congress presumed the traditional allocation of the burden of proof would apply.[8]

4. Other provisions of the Act, as amended in 2004, support the traditional allocation of the burden of proof. One of Congress's primary aims with the 2004 Amendments was to reduce the amount of litigation and promote cooperation with respect to the adoption and implementation of IEPs. See H.R. Rep. No. 77, 108th Cong., 1st Sess. 85 (2003) (noting amendments were designed to "[r]estor[e] trust and reduc[e] litigation" concerning IEPs). Specifically, the Amendments strengthen the notice requirements for due process complaints, 20 U.S.C. 1415(b)(7)(A), establish a two-year statute of limitations for such complaints, 20 U.S.C. 1415(b)(6)(B), encourage the use of voluntary mediation, 20 U.S.C. 1415(e), and authorize the award of attorney's fees to the school district if a parent's complaint is frivolous or was filed for an improper purpose, 20 U.S.C. 1415(i)(3)(B). See H.R. Rep. No. 77, *supra*, at 85-86.

In making those changes, Congress sought to alleviate the burdens imposed on school districts by "excessive litigation under the Act," and "align the Act" with other federal statutes such as those authorizing "civil rights claims, Federal tort claims, [and] Social Security." H.R. Rep. No. 77, *supra*, at 116. Those goals would be undermined rather than served by imposing a non-textual burden of persuasion on schools that amounts to a presumption of invalidity of actions by

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[8] In 2004, Congress eliminated this express, but limited, burden of proof on the school system. The relevant section as amended provides that a hearing officer may order the change in placement "if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or others." 20 U.S.C. 1415(k)(3)(B)(ii)(II).

public officials that is foreign to analogous civil and administrative proceedings.

D. Petitioners' Arguments That Considerations Of Policy And Fairness Require Placing The Burden Of Persuasion At All Times On The School Are Mistaken

Petitioners advance several policy arguments as to why the school district should bear the burden of proof in administrative proceedings in which the parents challenge the school's proposed IEP. None of those arguments is persuasive.

1. Petitioners suggest (Br. 22-28) that, by using the term "due process" to describe administrative hearings under the IDEA, Congress required that the school district bear the burden of proof. That contention is unavailing. Petitioners did not raise (and therefore waived) this argument in the courts below, and seemingly with good reason; nothing in the Due Process Clause requires the school to bear the burden of proof.

Far from supporting petitioners' argument, *Mathews* v. *Eldridge*, 424 U.S. 319, 335-348 (1976), on which petitioners rely, held that existing administrative procedures were constitutionally adequate and that the additional "procedural safeguard" of an evidentiary hearing was not required before the termination of disability benefits under the Social Security Act. In fact, the Court in *Mathews* noted that, to establish entitlement to disability benefits, a worker "*bears a continuing burden of showing*" that he suffers from a sufficiently severe disability to entitle him to benefits. *Id.* at 336 (emphasis added).

Shortly after *Mathews* was decided, moreover, this Court in *Lavine* v. *Milne*, 424 U.S. 577 (1976), unanimously rejected a due process challenge to a state law that placed the burden of proof on individuals claiming that they had been erroneously denied welfare benefits. The Court held that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Id.* at 585. Indeed, the Court in *Milne* appears to have viewed the allocation of the burden of proof as a substantive choice for the State and did not even apply the *Mathews* analysis. See *id.* at 587 ("[E]ven assuming, *arguendo*, that the burden of [the challenged provision] on the industrious indigent far outweighs any conceivable gain to the State from screening out the indolent few, New York nevertheless prefers its chosen course; and it is not for this Court to assay the wisdom of that determination."). By not only providing parents with a "due process" administrative hearing in which to challenge an IEP, but also providing extensive procedural safeguards both before, during and after such a hearing, Congress has more than satisfied any procedural due process requirements in the IDEA.[9]

2. Petitioners are also mistaken in their claim (Br. 29, 39-50) that a special allocation of the burden of proof is required because school districts have an unfair advantage over parents with regard to control over evidence and access to witnesses. This Court in both *Rowley* and *School Committee of Burlington* held that Congress has already addressed policy concerns, such as the potential disparities between the parties, through the IDEA's *procedural* safeguards and that it would be inappropriate to impose a substantive standard of review not found in the Act for such reasons. See *Rowley*, 458 U.S. at 206-207; *School Comm. of Burlington*, 471 U.S. at 368. Cf. *Greenwich Collieries*, 512 U.S. at 280 (Congress can address difficulties of proof through means other than shifting burden of persuasion). Those procedural devices, moreover, affect the balance in every case, not just the relatively rare case where the evidence is in equipoise.

Petitioners' arguments are also inconsistent with the pleading regime mandated by Congress, which places substantial burdens on parents to file a complaint detailing the precise nature of their objections to the IEP, including facts supporting those objections, and their proposed resolution of their complaint. 20 U.S.C. 1415(b)(7). Congress also mandated that the hearing itself shall be limited to the issues raised in the complaint, 20 U.S.C. 1415(f)(3)(B) (effective July 1, 2005), and it limited the school's obligation to respond to those same issues, 20 U.S.C. 1415(c)(2)(B) (effective July 1, 2005). Clearly, Congress thought that the procedural safeguards contained in the Act provided a sufficiently level playing field to make it fair to impose such substantial requirements on parents. There is no reason to believe that Congress reached any other conclusion with regard to the allocation of the burden of proof. See Pet. App. 11-12 (holding that in light of IDEA's procedural safeguards, "school system has no unfair information or resource advantage that compels us to reassign the burden of proof"). That conclusion is further buttressed by the fact that Congress expressly granted parents and schools equal rights to the safeguards applicable to the due process hearing. See 20 U.S.C. 1415(h).

3. Petitioners also contend (Br. 30-34) that placing the burden of proof on the school district would further Congress's remedial intent in enacting the IDEA. This argument, however, would apply equally to any other remedial or benefit-conferring statute. But as the court of appeals ob-

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[9] Petitioners point (Br. 43) to lower court decisions holding that, in the context of the five-step process that the Commissioner of Social Security uses "to determine whether a claimant has met the burden of proving his disability," the burden of proof shifts to the Commissioner at step five to show that there are jobs in the national economy that a claimant could perform. See *Doughty* v. *Apfel*, 245 F.3d 1274, 1278 (11th Cir. 2001). As this Court noted in *Bowen* v. *Yuckert*, 482 U.S. 137, 146 & n.5 (1987), however, that five-step process, including any burden born by the Commissioner in step five, is carefully controlled by regulation pursuant to the agency's "exceptionally broad authority to prescribe standards for applying certain sections of the Act." The Court emphasized, moreover, that the regulation in question generally "does not change the settled allocation of burdens of proof in disability proceedings," which the Court noted was on the benefits claimant. *Ibid.* In any event, there is no comparable requirement in the individualized inquiry into whether a proposed IEP provides a particular child with a free appropriate public education.

served, statutes such as Title VII, the ADA, the Rehabilitation Act, and the ADEA are remedial in nature and silent as to the burden of proof, "yet we assign it to the plaintiff who seeks the statutory protection or benefit; the burden is not assigned to the party with the statutory obligation." Pet. App. 8-9. Applicants for government benefits also generally bear the burden of proof to establish eligibility for benefits. See, *e.g.*, *Milne*, 424 U.S. at 582-583 ("as is the case when applying for most governmental benefits, applicants * * * bear the burden of showing their eligibility in all respects").

4. Petitioners further attempt to distinguish the IDEA on the ground that it does not merely prohibit schools from discriminating, but imposes an affirmative duty to provide a free appropriate public education to each disabled child. See Pet. App. 18 (Luttig, J., dissenting). But other federal antidiscrimination statutes also impose "affirmative" obligations.

Title VII's prohibition on discrimination on the basis of religion, for example, includes an affirmative duty to provide a reasonable accommodation of an employee's religious practice unless it would create an undue hardship. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 63 & n.1 (1986); 42 U.S.C. 2000e(j). Similarly, under the ADA and the Rehabilitation Act, if an employee shows that he is an "otherwise qualified individual with a disability," who can "perform the essential functions of the job" with reasonable accommodation, the employer has "an affirmative obligation to make a reasonable accommodation" for the employee absent a showing of "undue hardship." 42 U.S.C. 12112(b)(5)(A) (ADA); see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 289 n.19 (1987) (Rehabilitation Act). And, under the Family and Medical Leave Act (FMLA), the employer has an affirmative obligation to grant employees twelve weeks of unpaid leave per year to care for a newborn infant or adopted or foster child, to care for a parent, child, or spouse with a serious health condition, or because of the employee's own serious health condition. 29 U.S.C. 2612(a)(1)(A)-(D).

Nor can petitioners distinguish the ADA on the ground that it applies to a broad spectrum of businesses, whereas the IDEA applies only to public schools. See Pet. Br. 32. While true as to the ADA, Section 504 of the Rehabilitation Act, like the IDEA, applies only to recipients of federal funds. In any event, this distinction is unrelated to which party should bear the burden of proof. If anything, the fact that public schools have limited funds and a mission to educate all children, disabled and non- disabled, makes it more, not less, important to provide state and local educators with sufficient flexibility to achieve the requirements of the IDEA and, at the same time, to fulfill their mission with respect to all children.

5. Petitioners further seek to distinguish the IDEA on the ground that it requires a school to seek out children that require special education and to engage in a formal collaborative process with parents. Pet. Br. 32. But those differences do not justify shifting the burden of proof to the schools in every case (indeed, the IDEA's emphasis on collaboration suggests that the schools do not possess a monopoly on the relevant information). Nor does petitioners' argument validly distinguish the present case from other cases in which a plaintiff challenges government action. And whatever else might be said about administrative complaints challenging an IEP, they necessarily allege that public officials failed to comply with their legal obligations. In this critical respect, they are indistinguishable from complaints challenging government conduct under analogous statutes.

In addition, courts have held under the Rehabilitation Act and the ADA that an employer has an affirmative duty, at least where the employee can be reasonably accommodated, to "engage in an interactive process" with the employee to identify an appropriate reasonable accommodation. *Beck* v. *University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996); see, *e.g.*, *Mays* v. *Principi*, 301 F.3d 866, 870-871 (7th Cir. 2002) (Rehabilitation Act); *Peebles* v. *Potter*, 354 F.3d 761, 769 (8th Cir. 2004) (refers to "interactive process required" under Rehabilitation Act). The employer's duty to participate in an interactive process with employees with respect to reasonable accommodations under the Rehabilitation Act thus belies petitioners' purported distinction.

6. Petitioners further contend (Br. 34-38) that the school system should bear the burden of proof because the consequences of an erroneous decision would have a more serious adverse impact on a disabled child than on a school system. But this argument could be made in virtually any proceeding where an individual challenges government action, since the government always has greater resources than any given individual. Individuals challenging the denial of benefits, or the termination of their employment can also suffer dire consequences in the event of an erroneous denial, but that does not change the well-settled burden of proof in the context of anti-discrimination statutes and statutes that provide welfare or disability benefits. Indeed, as the APA default rule regarding burden of proof demonstrates, Congress found it appropriate for the benefit claimant generally to bear the burden of proof.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
BRADLEY J. SCHLOZMAN
Acting Assistant Attorney General
DAVID B. SALMONS
Assistant to the Solicitor General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

KENT D. TALBERT
Acting General Counsel
Department of Education

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IN THE

Supreme Court of the United States

October Term, 2004

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, *et al.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

Leslie Robert Stellman*
Rochelle S. Eisenberg*
Lisa Y. Settles
Hodes, Ulman, Pessin, & Katz, P.A.
901 Dulaney Valley Road
Towson, MD 21204
(410) 938-8800

Julie Underwood
Naomi Gittins
Thomas Hutton
National School Boards Assn.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

*Counsel of Record

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the boards of education of the District of Columbia and the U.S. Virgin Islands. NSBA represents the nation's 95,000 school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation. Recognizing that all children, including those with disabilities, have a right to be provided with free appropriate public education, NSBA has consistently supported the rights of disabled children, while at the same time being painfully cognizant of the significant funds that its members spend each and every year, above and beyond that provided by the Federal Government,[2] for the education of those children—and of the hard choices that this forces among services to children, including among disabled children.

Each year NSBA members participate in over 3,000 due process hearings conducted by local and state hearing officers pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA"), requiring the expenditure of millions of dollars and thousands of hours of professional time that otherwise could be devoted to the education of America's children. Millions of children in this country are educated according to individualized education programs ("IEPs") created pursuant to the IDEA in what is intended to be a collaborative effort between parents or guardians and school district employees, with the goal of ensuring educational progress and achievement even for the most profoundly disabled children.

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[1] This brief is filed with consent of both parties. No counsel for a party authored this brief in whole or in part. No person or entity, other than the *Amicus*, its members, or its counsel made a monetary contribution for the preparation or submission of this brief.

[2] While the Federal Government committed to funding 40 percent of the cost per pupil for special education when it first enacted the predecessor statute to the IDEA in 1974, thirty years later it still funds less than 20 percent of those costs, creating a cumulative funding gap of more than $4.3 billion for the last four fiscal years. NSBA, "Priority Issue: Federal Funding for Education" (Jan. 2005), *available at* www.nsba.org/site/docs/35100/35033.pdf (visited May 31, 2005).

The issue presented in this case—the assignment of the burden of proof in due process hearings brought under the IDEA—is of manifest importance to school boards. Usually such hearings arise from parental disagreement with school personnel over the appropriateness of an IEP, the adequacy of special education services, or educational placement decisions. NSBA believes that the Fourth Circuit properly assigned the burden of proof to the moving party—*i.e.*, the party seeking to challenge the IEP, level of services, or educational placement—and that automatic placement of the burden of proof on public school districts in all cases would result in needless proliferation of costs, prolongation and greater uncertainty as to the outcome of due process hearings, and disincentives for parents to work collaboratively with schools in crafting educational programs for disabled students. This, in turn, would increase the cost to school boards of the already substantially underfunded mandate that is today's IDEA, placing even greater demands on public schools' scarce resources and jeopardizing both special and regular education programs and the children they serve.

SUMMARY OF ARGUMENT

1. In the absence of any express statutory guidance with respect to the burden of proof in due process hearings brought under the IDEA, Congress should be understood to

allocate the burden of proof in precisely the same manner that such burden is assigned in other administrative cases. This means that the moving party, *i.e.*, the party seeking to challenge or change the *status quo*, should bear the burden of persuasion and the burden of proof. This is consistent with the IDEA's statutory scheme, with Congress's assignment of the burden of proof elsewhere in the IDEA, and with longstanding and prevalent administrative law jurisprudence.

2. Courts traditionally have adopted two fundamental principles in dealing with governmental and administrative agencies, including boards of education: (1) the presumption of correctness, *i.e.*, that public agencies act lawfully and correctly, unless proven otherwise; and (2) deference in matters concerning their particular expertise. Teachers and other dedicated school-based professionals who, along with parents, devise IEPs for disabled children should be entitled to the presumption that they have complied with the law and acted in the best interests of the children entrusted to their care—not that they are "guilty until proven innocent."

3. Of all federal statutes creating citizens' rights, the IDEA already contains perhaps the most comprehensive constellation of protections for its intended beneficiaries: children with disabilities and their parents. These include an extensive list of procedural safeguards that must be shared with parents at the commencement of each step of the process of developing and challenging an IEP. This is intended to guarantee that parents are equal partners with their schools in planning for their children's education. Moreover, school systems are obligated by federal law to provide parents with the complete record of their children's education, while the IDEA prescribes that the school system must inform parents five business days before a due process hearing begins of the evidence its intends to rely upon and the witnesses it intends to call. Parents are privy to the same, if not greater, information about their children's education.

Thus, there is no compelling policy justification for departing from the traditional obligation of the moving party, here the parents, to bear the burden of proof in seeking to challenge an IEP as having failed to provide their child with a free appropriate public education. To the contrary, shifting that burden to school boards would encourage parents and their attorneys to challenge even valid IEPs. Should the school system fail to meet this burden, parents potentially could achieve, without producing any evidence whatsoever, a court-ordered private placement at public expense, expensive services not necessarily required by the IDEA, and—a weighty factor that unavoidably influences IDEA decisions in ways bearing little or no relationship to actual educational outcomes—attorneys' fees. Congress's encouragement of mediation, as reflected in 20 U.S.C. § 1415(e) (2005) of the IDEA, would be undermined and due process hearings needlessly prolonged as school systems compelled to justify every single component of an IEP produce teachers, service providers, and other school-based professionals before the independent hearing officer in each and every case.

With the burden of proof placed on school systems rather than on parents challenging the outcome of the IEP process, the IEP process is more prone to become a discovery tool rather than a collaborative vehicle for preparing appropriate educational programs for disabled children. Due process hearings, in turn, could become no less than "super-IEP meetings," where parents for the first time would offer concerns and suggestions regarding their child's educational program or placement. The result would be a significant increase in costs to public school systems caused by the proliferation and prolongation of hearings, a greater risk of attorneys' fee awards to parents of special education students, and a more confrontational, rather than collaborative, atmosphere in such cases. Under the burden of proof scheme urged by the Petitioners, schools would be

required regularly to remove teachers and other school-based professionals from the classroom, where they are most needed, in order to place them on the witness stand to justify each component of often detailed and complicated IEPs. This would compromise the education of children in an era of greater accountability and the challenge of the No Child Left Behind Act, 20 U.S.C. § 6301 *et seq*. (2005).

Keeping the burden of proof where it belongs—on the moving party, here the parents who wish to dispute a particular IEP or placement decision[3]—would ensure that parents thoroughly identify, and support with relevant evidence, the precise basis upon which they have challenged the IEP, rather than obligating school systems to guess, at the outset of a due process hearing, just what it is the parents really wish to contest. The alternative is to leave school professionals at the mercy of hearing officers who may or may not permit them to offer evidence, by way of rebuttal, once they have finally heard the parents' case after having been able to present only general support for the IEP during the presentation of the school system's case-in-chief. The stakes are high whichever way the Court resolves this issue, given the over 11,000 requests for due process hearings that are made each year[4] and their resultant cost to public school systems,[5] a cost borne not only by non-disabled children but also by disabled students whose parents are less well counseled or attuned as to procedural strategies under IDEA.

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[3] Not all due process hearings are initiated by parents. School districts occasionally pursue due process hearings where, for instance, the district wishes to resolve the appropriateness of a public placement proposal in the face of the unilateral withdrawal of a child by its parents from public school and placement in a private school. *Yates v. Charles County Bd. of Educ.*, 212 F. Supp. 2d 470 (D. Md. 2002); *Krista P. v. Manhattan School Dist.*, 255 F. Supp. 2d 873 (N.D. Ill. 2003). Even under traditional evidentiary principles as adopted by the Fourth Circuit below, the burden of proof in such cases would rest with the district. NSBA's position is that when the school system initiates the hearing, the burden of proof should be placed on the school system as the moving party.

[4] GAO Report No. GAO-03-897, "Special Education: Numbers of Formal Disputes Are Generally Low and States Are Using Mediation and

ARGUMENT

The IDEA requires states to provide a free appropriate public education ("FAPE") to all children with qualifying disabilities between the ages of three and 21. 20 U.S.C. § 1412(1) (2005). Central to providing a FAPE for a disabled student is the development of an individualized education program ("IEP"). 20 U.S.C. § 1414(d) (2005). The IEP, the cornerstone for educational decision-making for disabled students, is developed through a team process involving, at minimum, the student's parent(s), one regular education teacher, one special education teacher, and a local education agency representative who is qualified to provide or supervise the provision of special education services and who is knowledgeable about the general curriculum and the school district's resources. 20 U.S.C. § 1414(d)(1)(B)(iv) (2005); 34 C.F.R. § 300.344(a)(4) (2005).

Where a school's implementation of these statutory requirements is subject to legal challenge, courts have consistently determined that the standard of proof is a preponderance of the evidence. Courts around the nation are

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Other Strategies to Resolve Conflicts" (Sept. 2003) (hereinafter "GAO Report 03-897").

[5] According to published statistics, in the 1999-2000 school year school districts spent an estimated $146.5 million on special education mediation, due process, and litigation activities. SPECIAL EDUCATION EXPENDITURE PROJECT, AM. INST. OF RESEARCH, WHAT ARE WE SPENDING ON PROCEDURAL SAFEGUARDS IN SPECIAL EDUCATION, 1999-2000? 5 (May 2003), http://www.csefair.org/publications/seep/national/Procedural%20Safeguards.pdf.

split, however, in allocating the burden of proof in IDEA cases. While allocation of the burden of proof is not always dispositive, determining which party bears the burden of proof in cases decided under the IDEA will produce the tie-breaker in cases where the evidence produced by the respective parties is virtually equal.

I. NOTHING IN IDEA REFLECTS ANY INTENT TO UPSET THE NORMAL BURDEN OF PROOF IN ADMINISTRATIVE PROCEEDINGS

A. The IDEA's Reliance on the Expertise of School Professionals to Accomplish its Goals Supports Assigning the Burden of Proof to the Party Challenging an IEP.

The initial inquiry in an administrative proceeding under the IDEA regards which party bears the burden of proof. The IDEA does not contain explicit authority for assigning the burden of proof to one party or another. Because the statute is silent, courts have resorted to various methods of statutory interpretation to discern congressional intent on this issue. In *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986), the Fifth Circuit best explained the rationale of those circuits that have placed the burden of proof on the moving party:

> [The IDEA] "place[s] primary responsibility for formulating handicapped children's education in the hands of local school agencies in cooperation with each child's parent." In deference to the statutory scheme and the reliance it places on the expertise of local school authorities . . . [IDEA] creates a "presumption in favor of the educational placement established

> by a [student's IEP]," and "the party attacking its terms should bear the burden of showing why the educational setting established by the [IEP] is not appropriate."

790 F.2d at 1158 (quoting *Tatro v. State of Texas,* 703 F.2d 823 (5th Cir. 1983), *aff'd in part, rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro,* 468 U.S. 883 (1984)).

The Fifth Circuit's rationale echoed this Court's clear recognition, in *Board of Educ. of Hendrick Hudson Central Dist. v. Rowley,* 458 U.S. 176, 207-208 (1982), of the paramount role of state and local education agencies in developing, in cooperation with parents, educational plans for disabled children. *Rowley* reiterated that courts should accord substantial deference to educational judgments made by school officials and that Congress shared this view when it enacted the IDEA. *Id.* at 208. Courts have followed this admonition in many IDEA cases and have been "reluctant indeed to second-guess the judgment of education professionals." *Tice v. Botetourt County Sch. Bd.,* 908 F.2d 1200, 1207 (4th Cir. 1990). In IDEA cases involving burden of proof issues, this reluctance has led many courts to conclude that the rationale expressed by the Fifth Circuit in *Alamo Heights, supra,* is most instructive.

To that end, the First, Fourth, Fifth, Sixth and Tenth Circuits have followed the view that the moving party bears the burden of proof and require that the parents demonstrate that the IEP proposed by the school district was not reasonably calculated to enable the disabled child to receive educational benefit and that there is a remedy for the school system's alleged failure to comply with the terms of the IDEA. *E.g., Doe v. Brookline Sch. Comm.,* 722 F.2d 910, 919 (1st Cir. 1983); *Weast v. Schaffer ex rel. Schaffer,* 377 F.3d 449, 452 (4th Cir. 2004); *Salley v. St. Tammany Parish Sch. Bd.,* 57 F.3d 458, 467 (5th Cir. 1995); *Tatro,* 703 F.2d at

830 ("[B]ecause the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate."); *Doe v. Board of Educ. of Tullahoma City Sch.,* 9 F.3d 455, 458 (6th Cir. 1993); *Johnson v. Indep. Sch. Dist. No. 4,* 921 F.2d 1022 (10th Cir. 1990).

These circuits have held to what the court below characterized as "the traditional burden of proof that requires the parents challenging an IEP to establish both its procedural and substantive deficiencies." *Weast,* 377 F.3d at 452, *quoting Cordrey v. Euckert,* 917 F.2d 1460, 1466 (6th Cir. 1990). In other words, the burden of proof is placed upon the parents to demonstrate that the IEP proposed by the school district was not reasonably calculated to enable the student to receive educational benefits.[6]

B. Congress's Explicit Allocation of the Burden of Proof Elsewhere in the IDEA Reflects its Intention to Retain the Traditional Placement of the Burden of Proof Upon the Party Challenging an IEP.

Nothing in the IDEA's legislative history would suggest that Congress intended that the burden of proof should be placed on the school district, rather than on a party challenging the district's special education decision-making.

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[6] Ironically, while the Commonwealth of Virginia has submitted an *amicus* brief, along with other states, in support of the Petitioners' position in the instant appeal, its own hearing officers have tended to follow the general rule acknowledged in the decision below. *See, e.g., Public Schools v. Doe,* Virginia Dep't of Education Division for Compliance Case No. 02-092 (2002) ("[T]he burden of proof was placed on the Parents as the party seeking to change the IEP.").

This is in contrast to other federal statutes such as the Freedom of Information Act, 5 U.S.C. § 552 (2005), where the courts were guided by clear congressional intent in assigning the burden of proof to government agencies seeking to withhold requested documents. *See, e.g., United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142, n.3 (1989) ("The burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not 'agency records' or have not been 'improperly' withheld. *See* S. Rep. No. 813, 89th Cong., 1st Sess., 8 (1965).").

Where no direct legislative statements indicate congressional intent, it is reasonable to draw inferences from other congressional action with respect to the statute. In this regard, where Congress chose to do so, it explicitly assigned the burden of proof with respect to a particular issue when it reauthorized the IDEA in 1997. Thus, for the seven years between the 1997 and 2004 reauthorizations of the IDEA, the statute specifically provided that where a parent challenges a school system's determination that it may impose normal disciplinary consequence on a disabled child because the misconduct at issue is not a manifestation of the child's disability, "the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability."[7] 20 U.S.C. § 1415(k)(6)(ii)(B). *See Alex R., ex rel. Beth R. v. Forrestville Valley Comm. United Sch. Dist. No. 221*, 375 F.3d 603 (7th Cir. 2004) (discussing the duty of school districts to conduct a functional behavioral assessment and to implement a behavioral intervention plan when the school imposes certain disciplinary sanctions on a disabled child).

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[7] Signed into law on December 1, 2004, the Individuals With Disabilities Education Improvement Act. Pub. L. No. 108-446, 118 Stat. 2614 (2004), which reauthorized the IDEA, removed this language from the statute. The reauthorized IDEA becomes effective July 1, 2005.

From this language it may be inferred that had Congress intended to depart from the traditional assignment of the burden of proof upon the party challenging the *status quo*, such as an existing IEP, it would have and could have done so. *Cf. Doe v. Chao*, 540 U.S. 614, 620, 621 (2004) (refusing to expand a right of recovery under the Privacy Act where Congress used language limiting the scope of the right and where expansion beyond the statutory text would be in tension with traditional legal principles).

In short, Congress chose not to assign the burden of proof in due process hearings brought pursuant to the IDEA, nor did it offer any legislative guidance on the subject other than at one time to explicitly assign such burden with respect to a completely different aspect of the IDEA, *i.e.*, so-called "manifestation hearings."

C. In the Absence of Clear Statutory Authority, Courts Should Allocate the Burden of Proof in IDEA Cases in the Same Manner as it is Assigned in Other Administrative Cases.

In the absence of any congressional guidance with respect to the burden of proof in due process hearings, courts should allocate the burden of proof in precisely the same manner that such burden is assigned in other administrative cases.[8] This means that the moving party, *i.e.*, the party seeking to challenge or change the *status quo*, should bear the burden of persuasion and the burden of proof. This is consistent with longstanding administrative law jurisprudence. Under virtually every federal and state administrative procedures law and practice, unless otherwise expressly provided by statute, the proponent (*i.e.*, moving party or one asserting the affirmative of an issue) bears the burden of proof in administrative proceedings. *Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); 2 AM. JUR. 2D ADMINISTRATIVE LAW § 354 (2004). Accordingly, the failure of the proponent to sustain the burden of proof will result in a denial of the relief sought. *Velasquez v. Dep't of Higher Educ.*, 93 P.3d 540 (Colo. Ct. App. 2004).

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[8] Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2005), is the closest analogous statute to the IDEA, for it prohibits federal fund recipients from depriving disabled citizens from equal access to public services, including education. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); 34 C.F.R. § 104.33 (2005). As with the IDEA, there is no specific burden of proof allocated under Section 504 in the language of the statute, leading courts to logically presume that in cases where an accommodation is requested of an educational institution, the burden of proof should rest with the plaintiff to show that the requested accommodation will meet the "special needs" of the plaintiff

In this regard, administrative law and practice reflect widely accepted principles for determining burden of proof in adversarial proceedings. The burdens of pleading and proof with regard to most facts have been, and should be, assigned to the party who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion. 2 J. STRONG, MCCORMICK ON EVIDENCE § 337 pp. 509-511 (5th ed. 1999). It is also axiomatic that the burden of proof should be placed "upon the party to whose case the fact is essential." 9 WIGMORE ON EVIDENCE, § 2486 at 288 (CHADBOURN rev'd

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"without sacrificing the integrity of the [defendant's] program." *Brennan v. Stewart*, 834 F.2d 1248, 1262 (5th Cir. 1988), *quoted in McGregor v. Louisiana State University*, 3 F.3d 850, 855 (5th Cir. 1993). *See also Lapid-Laurel v. Zoning Bd. of Adjustment of the Township of Scotch Plains*, 284 F.3d 442, 458 (3d Cir. 2002), in which the Third Circuit adopted this same assignment of the burden of proof in a case brought under the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.* (2005), by a developer building housing for disabled elderly citizens.

ed. 1981). Applying these principles to IDEA cases, the party seeking a change in an IEP would bear the burden of explaining why the change is appropriate. That a party seeking to alter the *status quo* should bear the burden of proof plainly rests upon "broad reasons of experience and fairness." *Id.* at § 2487 at 292.

As shown below, the IDEA should be interpreted as adopting the normal burden of proof since there is no compelling reason, either based upon public policy or principles of fairness and justice, that would justify departing from this longstanding and time-tested rule.

II. PUBLIC SCHOOLS, LIKE OTHER GOVERNMENT AGENCIES, ARE ENTITLED TO A SUBSTANTIAL DEGREE OF DEFERENCE THAT RECOGNIZES THEIR EXPERTISE AND PRESUMES THEIR GOOD FAITH.

Even beyond the specific IDEA context (*see supra* Part I.A), courts traditionally have adopted two fundamental principles in dealing with governmental and administrative agencies generally, including boards of education: (1) the presumption of correctness, *i.e.*, that public agencies act lawfully and correctly, unless proven otherwise, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984); and (2) that they are entitled to deference in matters concerning their particular expertise. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982); *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 849 (6th Cir. 2004). Thus, in *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1410 (5th Cir. 1983), the Fifth Circuit interpreted this Court's landmark student disability rights decision in *Southeastern Community College, supra*, as supportive of "a reasonable deference to the decisions made by administrators of federally funded programs so long as no evidence is presented of discriminatory intent with regard to the handicapped person."

Whether appointed by elected officials or elected by their communities, public school boards are presumed to act in the best interests of the children they educate and, by extension, the best interests of our nation, the future of which depends so directly on that education. As one court succinctly stated, the school board "is a public body charged with a public responsibility" that must be exercised "solely in the best interests of the children attending the schools." *Taylor v. Board of Educ. of City School Dist.*, 191 F. Supp. 181 (S.D.N.Y. 1961), *aff'd* 294 F.2d 36 (2d Cir. 1961). Yet the thrust of Petitioners' and supporting *amici* briefs presupposes that teachers and other public school professionals have the malevolent intent to deprive disabled children of the basic rights guaranteed under the IDEA.

There is no empirical basis for this wholesale challenge to the good faith of public school professionals. To the contrary, $78.3 billion is spent each year on special education students, with $6.7 billion alone spent at the state and local levels for "assessment, evaluation and IEP related activities."[9] School systems that choose not to comply with the requirements of the IDEA by failing to provide disabled children with FAPE risk losing their share of over $11 billion in federal funding appropriated by Congress during the last fiscal year for special education aid to the states.[10]

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[9] Special Education Expenditure Project, Am. Inst. of Research, What Are We Spending on Special Education Services in the United States, 1999-2000? 20 (updated 2004). http://www.csef-air.org/ publications/ seep/national/ AdvRpt1.PDF.

[10] U.S. Dep't of Education, FY 2006 Budget Summary, Section 2.B. (Special Education and Rehabilitative Services), http://www.ed.gov/ about/overview/budget/budget06/summary/edlite-section2b.html

Several provisions of the IDEA manifest Congress's concern that special education teachers and staff be adequately trained to work with children with disabilities. *See, e.g.*, 20 U.S.C. § 1413(a)(3)(A)(ii), (iii) (2005); 20 U.S.C. § 1431(a), (b) (2005); *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922, 932, n.37 (M.D. Ala. 1990). Thus, it is only fair and reasonable that, when challenged by parents, an IEP that was the creation of the parents along with teachers and other school-based professionals be afforded a presumption of correctness that would place the burden of challenging it on the parents. This is no different than the "reasonable deference" afforded by the courts to federal fund grantees' determinations as to the reasonableness of an accommodation restriction when challenged by a disabled student seeking relief under Section 504 of the Rehabilitation Act. *Region 13*, 704 F.2d at 1410; *Brennan*, 834 F.2d at 1261.

Even those circuits that have placed the burden of proof on school districts in due process hearings have recognized the contradictory notion that "[d]eference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped." *Muller v. Committee on Special Educ. of the East Islip Union Free Dist.*, 145 F.3d 95, 101 (2d Cir. 1998) (*quoting from Briggs v. Bd. of Educ. of State of Conn.*, 882 F.2d 688, 693 (2d Cir. 1989)); *Adams v. State of Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999). Petitioners offer no persuasive basis to challenge the deference to which teachers and other school-based professionals are entitled in the formulation of a child's IEP.

(visited May 30, 2005).

III. REQUIRING THE PARTY CHALLENGING AN IEP TO SUSTAIN THE BURDEN OF PROOF IS CONSISTENT WITH SOUND PUBLIC POLICY.

Petitioners' position that IDEA's affirmative obligations should place a greater evidentiary burden on school districts than other civil rights legislation,[11] including disability rights laws such as Section 504 and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* (2005), is presumably predicated upon three considerations: (1) the alleged imbalance in resources and power between parents and school districts; (2) the presumption that the school district enjoys greater access to information about the child in question than the parents; and (3) the notion that the risk associated with a due process finding that errs in a school district's favor is far greater (*i.e.*, that a disabled child will be deprived of adequate educational services) than is the risk of erring in the parent's favor.

These policy bases advanced in opposition to the presumptive administrative and evidentiary placement of the burden of proof on the moving party are flawed in a number of respects. Moreover, Petitioners overlook the real consequences of placing the burden of proof on the school district to defend an IEP conceived in a process in which the parents share a collaborative role. Those consequences include a significant prolongation of the time and expense of due process hearings, a discouragement of mediated settlements as conceived by Congress when it reauthorized the IDEA in 1997, *see* 20 U.S.C. § 1415(e) (1997), and a diminution of the collaborative role of the IEP team.

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[11] Although, as noted in footnote 8, *supra*, the courts have consistently placed the burden of proof in Section 504 lawsuits upon the plaintiff to demonstrate that a requested accommodation is unreasonable under the statute, rather than upon the educational institution to show otherwise.

A. Unique Among All Remedial Legislation, the IDEA Provides a Myriad of Procedural Protections to Assure That Parents Are Not Disadvantaged, Regardless of Resources.

Congress recognized "that in any [IDEA] disputes the school officials would have a natural advantage," so it therefore "incorporated an elaborate set of what it labeled 'procedural safeguards' to ensure the full participation of the parents and proper resolution of substantive disagreements." *Schaffer ex rel. Schaffer v. Weast*, 377 F.3d 449, 453 (4th Cir. 2004), *quoting School Comm. of Town of Burlington, Mass v. Dep't of Educ.*, 471 U.S. 359, 368 (1985). Notably absent from these conscientiously considered and carefully crafted protections is any provision to shift the burden of proof from its traditional assignment to the challenging party.

The IDEA ensures that parents are informed of the rights and protections available to them under the law. The IDEA's detailed procedures must be summarized in readable form and distributed to parents at every IEP meeting, whenever any change is being made to an IEP or placement, and even when a due process hearing is requested by the parents. They include: (1) prior written notice given a reasonable time before any proposed change is implemented in the child's educational program; (2) notices written in "language understandable to the general public" and in the primary language of the parents; (3) parent access to the records relevant to the case and the right to have the records explained, to make copies, and to amend records they consider inaccurate, misleading, or an invasion of privacy; and (4) an opportunity for a fair and impartial hearing where parents have the right to be represented by a lawyer or an individual trained in the problems of children with disabilities; the right to present evidence and to subpoena, confront, and cross-examine witnesses; and the right to obtain a transcript of the hearing and a written decision by the hearing officer. *See* 20 U.S.C. § 1415 (2005); 34 C.F.R. §§ 300.129, 300.500-300.517 (2005) (providing detailed procedural protections for parents and children, including the right to an independent educational evaluation and to prior notice of any initiation or change in the "identification, evaluation, or educational placement of the child"); 34 C.F.R. § 300.503(a) (2005) (prescribing the contents of the notice containing procedural safeguards);[12] 34 C.F.R. § 300.509 (2005) (enumerating the extensive hearing rights parents have before an "impartial hearing officer").

Guaranteeing these procedural safeguards is so fundamentally a part of the law that failure to fulfill them has been construed by the courts in some circumstances to be a denial of the right to FAPE, even where the substance of the child's IEP is reasonably calculated to provide educational benefit, as prescribed by the IDEA. *Honig v. Doe*, 484 U.S. 305 (1988); *Heather S. v. State of Wisconsin*, 125 F.3d 1045 (7th Cir. 1997).[13] This provides ample incentive for school

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[12] Appendix A, attached hereto, contains a sample of the written procedural safeguards that a local school district provides to parents at the commencement of each and every IEP team meeting to ensure that they fully understand their rights. For a concise summary of the procedural protections afforded parents by the IDEA, *see* FISCHER, SCHIMMEL & STELLMAN, TEACHERS AND THE LAW (6TH ed. 2003), 354-355.

[13] Notably, despite the Third Circuit's having joined those circuits that have sought to shift the burden of proof to the school districts in IDEA cases, a recent ruling by that court appears to have reached precisely the opposite conclusion. In *C.M. v. Board of Educ. of the Union County Regional High Sch. Dist.*, No. 04-1407 (3d Cir. April 19, 2005) *at* http://www.ca3.uscourts.gov/opinarch/041407np.pdf, at *2, the Third Circuit held in an unreported decision that, "A plaintiff bears the burden of establishing the harm caused by the claimed procedural shortcomings, and Plaintiffs here clearly have not met that burden." This ruling, albeit unpublished, would appear to suggest that that court has begun to question its reasoning on burden-shifting in *Oberti v. Board of Educ.*, 995 F.2d 1204 (3d Cir. 1993) as well as *Lascari v. Board of Educ. of the*

districts to make concerted efforts to ensure that they follow procedures closely and afford parents the protections to which the law entitles them.

Given the many procedural safeguards to which parents are entitled, the notion advanced by Petitioners that parents of disabled children, particularly those who are economically disadvantaged, are not on an equal footing with the school district as they participate in the IEP team process and, if a dispute arises, in a due process hearing, is inaccurate.[14] A school system that fails to answer parents' questions about their child's education or to take their input into account at the IEP team may be found out of compliance

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Ramapo Indian Hills Regional High Sch. Dist., 116 N.J. 30, 560 A.2d 1180 (1989), a case heavily relied upon by the Petitioners in this case. In *Lascari* the New Jersey Supreme Court sought to interpret federal IDEA law on the subject of assigning the burden of proof.

[14] Petitioners urge this Court to assign the burden of proof to school districts in part based on the disadvantages experienced by low income families, such as difficulty in securing and paying for an attorney and expert witnesses and lack of understanding of a complex and daunting legal process that school districts allegedly manipulate at every turn to deny children the special education to which they are entitled. This argument suffers from several flaws: 1) it ignores the fact that Congress already considered these disadvantages and made public policy decisions about what statutory protections (e.g., attorneys' fees for prevailing parents, parent assistance centers) would compensate for them; 2) it implies, without any substantiation, that allocating the burden of proof to school districts somehow would significantly influence the decision by low income families to pursue due process hearings and would markedly improve their chances of success, thus improving the educational services their children receive; and 3) it fails to acknowledge that, in practical terms, it will be the affluent parents, who are already more likely to request due process hearings and to retain counsel, GAO Report at 15 n. 22, who stand to benefit most from such a shifting of the burden, but the costs imposed by the lengthier and more expensive hearings engendered by such a shift will be borne by all, by diverting money and professional resources away from special education programs and services.

with federal law, and risks loss in any resultant dispute. As the Fourth Circuit has consistently held, "Failure to meet IDEA's procedural requirements is an adequate ground for holding that the public school failed to provide a free appropriate public education." *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985), *citing Rowley*, 458 U.S. at 206, n.27; *accord Board of Educ. of Cabell County v. Dienelt*, 843 F.2d 813, 815 (4th Cir. 1988).

B. Under the IDEA Parents Have Broad Access to their Children's Educational Information, Making Them Equal Partners With School Professionals in Developing Their Children's Educational Program

Courts consistently have recognized Congress's intent that parents be treated as equal partners with teachers and other public school professionals in the development of a child's IEP. For instance, in *Hanson ex rel. Hanson v. Smith*, 212 F. Supp. 2d 474, 481 (D. Md. 2002), the court observed that "the [IDEA] contemplates parental participation in the development of the IEP." IDEA anticipates the parents' attendance at all IEP meetings and participation at every step of the development of the child's educational program. The court in *Hanson* went on to observe that "the individualized educational program or IEP is the centerpiece of a FAPE and is a collaboratively developed plan for a disabled child's education. The IEP is supposed to be the joint product of discussions among the child's parents, teachers, and local school officials and must specify goals and short-term objectives for the child, any related services, and the criteria and evaluation procedures that will be used." *Id., quoting Sanger v. Montgomery County Bd. of Educ.*, 916 F. Supp. 518, 520 (D. Md. 1996). *See also Justin G. ex rel. Gene R. v. Board of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 582 (D. Md. 2001).

To that effect, parents are never without access to the educational, medical, and psychological records needed to enable them to participate as equal partners in the development of their child's IEP. Both the IDEA and the federal law compelling the disclosure of educational records (the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2005) ("FERPA")) ensure that parents have access to the very same records upon which school district personnel rely in crafting the IEP and proposing an appropriate educational placement for the child. Similar requirements are contained in the IDEA and its implementing regulations. 34 C.F.R. § 300.501 (2005) (labeled "Opportunity to examine records"). Thus, well in advance of the creation of an IEP, a parent has the right to examine his/her child's school records and to ask questions of teachers and other knowledgeable school personnel if unable to understand those records.

Indeed, in cases such as the instant proceeding where the student has never previously attended public school, the parents, not the school district, have far superior access to and knowledge of their child's educational progress. Parents of children such as Brian Schaffer, who attended a private school while contemplating a public school placement, will have access to private school records that the school district may not see during the IEP process, as parents have no obligation to disclose records, unlike the school system, which must share all school records with the parents. In *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001)(emphasis added), the Ninth Circuit observed that "[b]y mandating parental involvement and requiring that parents have full access to their child's records, Congress sought to ensure that the interests of the individual children were protected. *See Rowley*, 458 U.S. at

208. Not only will parents fight for what is in their child's best interests, *but because they observe their children in a multitude of different situations, they have a unique perspective of their child's special needs.*" Thus, even the Ninth Circuit, one of the courts that assigns the burden of proof to the school district, *Clyde K. v. Puyallup School Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994) (stating, without rationale, that "[t]he school clearly had the burden of proving at the administrative hearing that it complied with the IDEA."), appreciated the "unique perspective" that rendered parents far more knowledgeable than school district employees about their children.

Moreover, both the IDEA and its implementing regulations prescribe that parents have access to a list of school district witnesses and copies of all documents, including "all evaluations" prepared with respect to their child that the school district intends to use, at least five business days prior to the start of any due process hearing. 20 U.S.C. § 1415(f)(2) (2005); 34 C.F.R. § 300.509(b) (2005). Parents, like school districts, have the right to compel the attendance of witnesses, including school district employees, at due process hearings. 34 C.F.R. § 300.509(a)(2) (2005).

Thus, Congress has substantially evened the playing field, obviating the need to depart from the Fourth Circuit's proper application of the traditional evidentiary rule that places the burden of proof on the moving party. Moreover, there is no sound basis for concluding that in those jurisdictions where parents are assigned the burden of proof, there has been any notable loss of educational benefit suffered by disabled children. Where, as in the instant case, a "close call" must be decided in the school district's favor based upon the assignment of the burden of proof to the parents, the evidence must substantially support the validity of the school district's proposed educational program, or

there would be no such "close call." In short, requiring parents to bear the burden of proving that an IEP has failed to provide their child with a FAPE, or that the school district somehow failed to comply with the IDEA, has not led to wholesale abuses, much less flaunting of the law, by school personnel.[15] To suggest otherwise is to demean the hundreds of thousands of special educators and service providers who have committed their lives and careers to educating children with special needs.

C. Assigning the Burden of Proof to School Districts in Every Case in Which an IEP is Challenged Will Result in More and Lengthier Hearings, With More Uncertain Outcomes.

Shifting the burden of proof to the school district in all cases, based upon the erroneous assumption that parents are not, in fact, equal partners in the IEP process, will undoubtedly undermine the collaborative process between parents and school professionals contemplated by Congress. Although armed with the same or greater knowledge of their child's needs and abilities, parents and their attorneys who need no longer bear the burden of proving a specific flaw in the child's IEP may now sit back in hopes that the school district somehow will miss proving at a due process hearing that it complied with the IDEA in each and every respect. In turn, teachers and other school-based professionals will face every due process demand with the prospect that they may somehow fail to satisfy a hearing officer or administrative law judge as to the validity of each and every component of an IEP that they sought to develop in good faith.

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[15] In 2003, GAO reported data showing a "remarkably low incidence of serious disputes over special education programming" during the 2001-02 school year. The U.S. Department of Education interpreted this data as providing "little support for anecdotal contentions of widespread and systemic problems." GAO Report 03-897 at 29 (reproducing letter of Dr. Robert Pasternack, Assistant Secretary of Education).

IEPs may no longer be prepared by cooperative teams of parents and educators as IDEA envisions, but instead effectively will become mere adversarial antecedents to potential due process hearings. At such hearings, without putting any evidence into the record and indeed, by simply informing the school district in advance that he /she disagrees with the IEP,[16] a parent can simply await the possibility that a school district fails to meet its burden of demonstrating the validity of each and every component of the child's IEP.

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[16] Current law requires state agencies responsible for conducting due process hearings to prescribe a procedure requiring parents to inform the school district and hearing officer, in advance of a due process hearing, of "the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem." 20 U.S.C. § 1415(b)(7) (2005). Yet besides the fact that, on its face, this requirement does not guarantee that a school district will have adequate particulars as to the basis for a due process hearing demand prior to trial, the only means of enforcing this provision is by a post-hearing reduction (not even necessarily a complete elimination) of attorneys' fees awarded to a prevailing parent for non-compliance. 20 U.S.C. § 1415(i)(3)(F)(iv) (2005). Under the Individuals with Disabilities Education Improvement Act, Pub. L. 108-446, effective July 1, 2005, a school district may challenge the sufficiency of the due process notice provided by the parents, *id.* at § 615(c)(2)(A); and upon receiving such a challenge, a hearing officer must determine whether the notice meets the statutory requirements. *Id.* at § 615(c)(2)(D). Sufficiency of the notice is a prerequisite to holding a due process hearing, *id.* at § 615(b)(7)(B), and during the hearing parents may not bring up issues not raised in the notice. *Id.* at § 615(f)(3)(B). While on their face these procedures may enable school districts to understand better the particulars of parental complaints prior to due process hearings and prevent "surprise" issues from being unveiled for the first time during the hearing, they do not necessarily circumscribe the evidence a school district bearing the burden of proof would be forced to produce if it must show that the IEP as a whole provides FAPE.

Applying the reasoning of some of the circuit courts of appeals, a school district might even have more generally to prove its "compliance with the IDEA," *Clyde K.*, 35 F. 3d at 1398, a sweeping and ambiguous goal that presents even greater challenges of proof, especially when there is an insufficient understanding of the parents' precise concerns with the school district's "compliance." Under such a burden of proof scheme, school districts may become responsible for the award of unnecessary, costly, and unreasonable services, not to mention the substantial risk of paying thousands of dollars in attorneys' fees to the prevailing parents.

Some of the more unreasonable, unjustified, and costly demands that have been asserted by parents of disabled students as part of IEP challenges in a due process hearing include: a request that the school system fund post-graduate education, *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176 (3d Cir. 1986); that it stop assigning a child homework, *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373 (5th Cir. 2003); that an aide be present until an adult arrives at the bus stop to take a child home, *M.S. ex rel. L.S. v. Scarborough Sch. Comm.*, 366 F. Supp. 2d 98 (D. Me. 2005); that the school district provide the student hippotherapy (*i.e.*, the use of horses as a therapeutic tool) at public expense as a form of occupational therapy, *Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116 (10th Cir. 1999); that video teleconferencing equipment be installed in a second grade classroom in order to accommodate an absent child, *Eric H. ex rel. John H. v. Methacton Sch. Dist.*, 265 F. Supp. 2d 513 (E.D. Pa. 2003); that a school system pay two years of private school tuition because parents disputed testing methods used to evaluate progress, *Protano v. Valley Central Sch. Dist.*, 2001 WL 209935 (S.D.N.Y. Feb. 15, 2001); that transportation and other special education services be provided while a child attends college, *Chuhran v. Walled Lake Consol. Sch.*, 839 F. Supp. 465 (E.D. Mich.

1993), *aff'd without published opinion* 51 F.3d 271 (6th Cir. 1995); that a school system fund a child's inpatient substance abuse rehabilitation following the child's expulsion for alcohol and marijuana use, *Field v. Haddonfield Bd. of Educ.*, 769 F. Supp. 1313 (D.N.J. 1991); and that a school system provide a child aquatic therapy (*i.e.*, a specific modality of physical therapy), *In re Student with a Disability*, West Virginia State Educational Agency Case No. 97-020, 102 IDELR 1864 (1997).

When the burden of proof is placed on the school district to prove, variantly, its "compliance with the IDEA," *Clyde K.*, 35 F. 3d at 1398, or "the appropriateness of the IEP it has proposed," *Oberti*, 995 F.2d at 1031, the mechanics of the due process hearing are dramatically affected. Rather than requiring that parents open a due process hearing by presenting evidence supporting their specific objection(s) to the IEP or placement decision with which they disagree (as would occur where the parents bear the burden of proof and persuasion), the school system's assumption of the burden of proof would compel it to present its case-in-chief without necessarily knowing, in advance, anything more than a generalized claim of, for instance, a "failure to provide FAPE" or "refusal to provide appropriate extended school year services." Instead of responding to the parent's specific complaint, a school district would have to prove a negative, not only that there were no failings with respect to the procedural safeguards afforded the parents, but also that each and every component element of the IEP was not inappropriate, in hopes of somehow addressing the as yet unarticulated exact reasons for the parental challenge. Yet IEPs (particularly those involving profoundly disabled students) are often quite detailed compilations of measurable learning goals, short and long-term objectives, and assessment tools to ensure that progress may be adequately

measured.[17] If even a single element of the IEP document is successfully challenged in a due process hearing, the parent prevails and is eligible for substantial remedies including private school tuition reimbursement, often unreasonable requested services, and attorneys' fees.

With the burden of proof assigned to the school district, procedurally the school district must rest its case before it learns exactly what components of an IEP are being challenged, be it the number of hours the child is offered a related service such as physical or occupational therapy, the validity of a particular reading goal, or the absence of certain adaptive technology in the classroom.[18] Alternatively, the parent can simply contend that the school district somehow failed to fully comply with the IDEA, a generalized claim that may be impossible adequately to rebut. At the conclusion of the parent's case, the school system is subject to the discretion of a hearing officer or administrative law judge who may or may not allow rebuttal evidence on the true issue that the parent has held back from revealing until it may now be too late to disprove. *Faigin v. Kelly*, 184 F.3d 67, 86 (1st Cir. 1999) (confirming that granting or denial of rebuttal rests entirely within discretion of trier of fact).

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[17] Appendix B is a model IEP containing the types of goals, objectives, and assessment tools required by 20 U.S.C. § 1414(d) (2005). Where the burden of proving the "appropriateness of the IEP," *Carlisle Area School v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995), rests with the school district, every line of this document poses a potential pitfall for a district attempting to meet a hearing officer's expectations of an "appropriate" goal, objective, or even determination as to the child's present level of performance.

[18] This presupposes that the school district has, in fact, met its burden of proving that the IEP in question was appropriate, and/or that it complied fully with the IDEA. So long as the district is required to carry this heavy burden of proof, it risks the very real possibility that, upon resting its case-in-chief, the hearing officer will find that it has not met that burden, thereby ruling in the parents' favor even before the school district has learned the precise nature of the parents' complaint. Such a chilling and Kafkaesque outcome clearly was not contemplated by the authors of the IDEA.

While due process typically is considered an issue only for parents, in reality both parties are entitled to due process and a fair opportunity to prepare for and explain their respective cases.[19] When a school system is denied this opportunity and loses—either because it was denied an opportunity for rebuttal testimony after it finally learned the true extent of the parents' case, or on account of its failure to satisfactorily demonstrate full compliance with the IDEA, or because it was unaware of the particular challenge to a

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[19] Neither the current IDEA nor its implementing regulations require that hearing officers charged with conducting due process hearings hold a pre-trial conference where the precise issues to be tried are identified, much less a mechanism that would prevent a parent from introducing issues at the hearing that were never previously identified. While the newly reauthorized IDEA, effective July 1, 2005, does limit parents to raising only previously identified issues during the hearing, it does not mandate the holding of pre-hearing conferences that might produce stipulation that the IEP complies with FAPE requirements except as to the particular issues specified in the due process notice. Without such a stipulation, if the school district bears the burden of proof, a hearing officer could determine that the burden still entails production of evidence sufficient to prove complete compliance with the IDEA. As with the allowance of rebuttal evidence, the determination of whether to hold such a pre-trial hearing for the purpose of identifying the precise issues to be tried rests entirely within the discretion of the hearing officer and, in some states, may not even be a recognized procedure in administrative hearings. For example, the Code of Maryland Regulations governing hearings conducted by administrative law judges (such as special education due process hearings, including that held below in the instant case) provides only that, "When appropriate, the judge may hold a prehearing conference to resolve matters preliminary to the hearing," including, *inter alia*, "[F]actual and legal issues." COMAR §§ 28.02.13(A),(C)(2) (2004). The determination of when such a conference is "appropriate" is left entirely up to the administrative law judge.

specific IEP goal, objective, or service—it is required to pay large sums of money in attorneys' fees and private school tuition or in costly compensatory educational services.

Given the chronic underfunding of special education by the Federal Government, the only place school boards can find the funds to pay for the consequences of this form of procedural "Russian Roulette" in every due process hearing is from the special and regular education classrooms. Losing even a single due process hearing can cost a school board the price of two or more full-time teachers.[20] Yet that is precisely the foreseeable outcome of a system that encourages parents to initiate due process hearings rather than serve as partners with public schools in developing their child's educational programs.

Finally, Congress's stated intention that disputes arising under the IDEA be resolved through the less costly process of federal- and State-mandated mediation, *see* 20 U.S.C. § 1415(e), would be seriously undermined if parents are no longer expected to prove violations of the statute to prevail in due process hearings, thus obtaining services, compensation,[21] and attorneys' fees merely by making generalized claims of "non-compliance" or "inappropriateness" of an IEP.

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[20] A federal court in Maryland recently awarded over $217,000 in attorneys' fees and costs to parents who prevailed in a routine special education case disputing the appropriateness of an IEP. *Board of Educ. of Frederick County v. I.S. ex rel. Summers*, 358 F. Supp. 2d 462 (D. Md. 2005).

[21] At least one circuit court of appeals has ruled that "in a [42 U.S.C. §] 1983 (2005) action to enforce IDEA, . . . compensatory damages are available to remedy IDEA violations." *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995). *See also Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (finding "that the traditional presumption in favor of all appropriate relief is not rebutted as to § 1983 actions to enforce IDEA," and suggesting that "compensatory damages for generalized pain and suffering" may be available in certain § 1983-based IDEA claims. *Matula*, 67 F.3d at 495.)

In short, automatically assigning the burden of proof to school districts and away from the moving party will only accelerate the ever increasing costs that school districts are expected to incur in the administration of the IDEA, with no guarantee that disabled children will be better served. Assigning the burden of proof to the moving party in special education due process hearings is thus consistent not only with longstanding administrative law and evidentiary principles but with both congressional intent and public policy considerations.

CONCLUSION

For the foregoing reasons, the judgment below should be **AFFIRMED**.

Respectfully submitted,

Leslie Robert Stellman*	Julie Underwood
Rochelle S. Eisenberg*	Naomi Gittins
Lisa Y. Settles	Thomas Hutton
Hodes, Ulman, Pessin	National School
& Katz, P.A.	Boards Association
901 Dulaney Valley Road	1680 Duke Street
Towson, MD 21204	Alexandria, VA 22314
(410) 938-8800	(703) 838-6722
*Counsel of Record	

APPENDIX A

CARROLL COUNTY PUBLIC SCHOOLS

RIGHTS OF PARENTS BROCHURE

APPROPRIATE EDUCATION PROGRAM

LEAST RESTRICTIVE SETTING

FREE PUBLIC EDUCATION

DUE PROCESS

CONFIDENTIALITY

INDIVIDUAL EDUCATION PROGRAM

ADMISSION, REVIEW, AND DISMISSAL COMMITTEE

**Unlocking the Regulations
to Better Serve Students**

CCPS/MSDE REVISION AUGUST/SEPTEMBER 2002
IDEA AMENDMENTS 1997 (P.L. 105-17) HTF - [illegible]

BEST AVAILABLE COPY

PROCEDURAL SAFEGUARDS

Compliance Statement: This edition of the Rights of Parents Brochure has been compiled based on information supplied by the Maryland State Department of Education in conjunction with the Reauthorization of the Individuals with Disability Education Act (I.D.E.A. PL. 105-17). It is believed this document reflects the required language changes according to the Reauthorization. Should a reader discover language they believe is not accurate please notify the Office of Special Education of Carroll County Public Schools located at125 North Court Street in Westminster, MD 21157. This document is also considered the Rights of Parents in matters relating to Section 504 of the Rehabilitation Act.

PART I – PROCEDURAL SAFEGUARDS

The protections included in this document are established by the Individuals with Disabilities Education Act of 1997 (IDEA), 20 U.S.C.§1400 et seq., 34 CFR 300 and COMAR 13A.05.01.01-.16 that implement the IDEA. Each public agency shall establish, maintain, and implement procedural safeguards that meet the requirements of the IDEA. A copy of this document is to be provided to parents:

- Upon the initial referral of a child for evaluation;
- With each notice of a meeting to develop, review, or revise a child's Individualized Education Program (IEP);
- When a child is reevaluated; and
- When parents request mediation or a due process hearing.

The procedural safeguards must be written in language understandable to the general public and provided in the native language of the parents or other mode of communication used by the parents, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parents is not a written language, CCPS shall take steps to ensure that the procedural safeguards are translated orally or by other means in the parents native language or other mode of communication. There is written evidence that documents that the notice was translated and the parents understood the content of the procedural safeguards.

The parents of a student with a disability must be afforded an opportunity inspect and review all education records with respect to the identification, evaluation, educational placement of the child, and the provision of a free appropriate public education (FAPE). *Please refer to Part IX - Procedures Regarding Educational Records for more specific information.* The parents of a student with a disability must also be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement of the child, and the provision of FAPE to the child. *Please refer to Part VII - Individualized Education Program (IEP) for more specific information.* For additional copies of this document, please contact the child's school.

PART II – PRIOR NOTICE

CCPS must give parents written notice each time it proposes or refuses to initiate or change the identification, evaluation, educational program, or educational placement of a

child, or the provision of FAPE to a child. If the written notice relates to an action proposed by CCPS that also requires parental consent, CCPS may give written notice at the same time it requests parental consent. Written notice must include a:

- Description of the action(s) proposed or refused by CCPS;
- An explanation of why CCPS proposes or refuses to take the action(s);
- A description of any other options that CCPS considered and the reasons why those options were rejected;
- A description of each evaluation procedure, test, record, or report CCPS used as a basis for the proposed or refused action(s);
- A description of any other factors that are relevant to CCPS's proposal or refusal;
- A statement that the parents of a student with a disability have protections under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of the procedural safeguards can be obtained; and
- Sources for parents to contact to obtain assistance in understanding the provisions of the IDEA.

The notice must be written in a language understandable to the general public and provided in the native language of the parents or other mode of communication used by the parents, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parents is not a written language, CCPS shall take steps to ensure that:

- The notice is translated orally or by other means to the parents in his or her native language or other mode of communication;
- The parents understand the content of the notice; and
- There is written evidence that documents that the notice was translated and the parents understood the content of the notice.

PART III – CONSENT

Consent means that the parents:

- Have been fully informed of all information relevant to the activity for which consent is sought, in the parents native language or other mode of communication;
- Understand and agree in writing to the carrying out of the activity for which their consent is sought and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- Understand that the granting of consent is voluntary on the part of the parents and may be revoked at anytime.

If parents revoke consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

General

CCPS must obtain parental consent before conducting an initial evaluation or reevaluation and before the initial provision of special education and related services to a student with a disability. Consent for initial evaluation may not be construed as consent for initial placement for the initial provision of special education and related services to a student with a disability. Parental consent is not required before reviewing existing data, as part of an evaluation or reevaluation, or administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

Parental Refusal

If parents refuse to give consent for the initial assessments or reassessments, CCPS has the right to request mediation or a due process hearing and is required to notify the parents of CCPS's request for a due process hearing and the availability of mediation. *Please refer to Part XIV – Resolving Disagreements for more specific information.*

Failure to Respond to Request for Reevaluation

CCPS must attempt to obtain informed parental consent before reassessing the child. Informed parental consent need not be obtained for reassessment if CCPS can demonstrate that it has taken reasonable measures to obtain parental consent, and the child's parents have failed to respond. If parents fail to respond to CCPS's written notice of their proposal to reassess the child, and CCPS can demonstrate that they have taken reasonable measures to obtain parental consent, CCPS may proceed with the reassessment without parental consent. To demonstrate reasonable measures, CCPS must maintain a record of CCPS's attempts to obtain parental consent, such as:

- Detailed records of telephone calls made or attempted and the results of those calls;
- Copies of correspondence sent to parents and any response received; and
- Detailed records of visits made to the parent's home or place of employment and the results of those visits.

Limitation

CCPS may not use the parent's refusal to consent to one service or activity, such as initial evaluation, reevaluation, or initial provision of special education and related services, to deny the parents or the child of any other service, benefit, or activity of CCPS except as required by the IDEA.

PART IV – EDUCATIONAL EVALUATION PROCESS

Assessments

Assessments are procedures that are individualized for each student. CCPS may use a variety of assessment tools and strategies to gather sufficient relevant functional and development information for the IEP team to determine if the child is a student with a disability and the content of the child's IEP. Assessments include printed tests, observations, information from parents, and other sources of information that are

- Selected and administered in a way that is not racially or culturally discriminatory;
- Administered in the child's native language or other mode of communication unless it is not feasible to do so;
- Used to measure the extent to which the child has a disability and needs special education services;
- Valid for the specific purpose for which they are used and are administered by trained and knowledgeable personnel according to the instructions provided by the producer of the test;
- Tailored to identify specific areas of educational need, not merely to provide a single general intelligence quotient;
- Measures of the extent to which a child with limited English is a student with a disability, rather than the child's English language skills; and
- Selected to reflect a child's aptitude or achievement accurately, rather than reflect the impaired sensory, manual, or speaking skills, except where these skills are the factors that the test is to measure.

Each report of assessment procedures shall include:

- A description of the child's performance in each area of suspected disability;
- Relevant functional, cognitive, developmental, behavioral, and physical information;
- Instructional implications for the child's participation in the general curriculum or, for a preschool child, participation in appropriate activities; and
- For any assessments not administered under standard conditions, a description of how it varied from standard administration procedures.

Evaluation

An individual who suspects that a child may have a disability that requires the provision of special education and related services may refer the child, in writing, to the IEP team at the child's school. CCPS has 90 days from the date the agency receives the written referral to complete the initial evaluation. CCPS will provide parents with a copy of the IEP team evaluation decision.

Evaluation means procedures used in accordance with federal and State regulations concerning procedures for evaluation and determination of eligibility, to determine whether a child has a disability and the nature and extent of the special education and related services the child needs. A full and individualized evaluation is conducted before the initial provision of special education and related services to a student with a disability under the IDEA. An evaluation occurs at a meeting of the IEP team and other qualified professionals, as appropriate, to review:

- Existing data and assessment results;
- Evaluations and information provided by parents;
- Current classroom-based assessments, including State and district-wide assessments and observations, and
- Observations by related services personnel to determine:
  - Whether the child is a student with a disability;
  - The child's present levels of performance and educational needs;
  - The child's special education and related service needs whether or not commonly linked to the disability category in which the child has been

classified; and

- Any additions or modifications needed for the child to meet the goals of the IEP and to participate, if appropriate, in the general curriculum.

The initial evaluation shall be comprehensive enough to ensure a child is assessed in all areas related to the suspected disability, including, if appropriate:

- Academic performance;
- Communication;
- General intelligence;
- Health, including hearing and vision;
- Motor abilities; and
- Social, emotional, and behavioral status. • No single procedure is used to determine if a child is a student with a disability and to determine an appropriate educational program for the child.
- A child may not be identified as a student with a disability in need of special education and related services if the primary reason for the eligibility determination is lack of instruction in reading or math, or because the child has limited English proficiency.
- If at the initial evaluation, the IEP team determines that the child has a disability and needs special education and related services, the IEP team must meet within 30 days of the initial evaluation to develop the child's IEP.

Reevaluation

A reevaluation will be conducted at least once every three years or more frequently if conditions warrant a reevaluation, or if parents or the child's teacher requests a reevaluation. The IEP team will review existing evaluation data, including information from parents, classroom-based assessments, State and district-wide assessments, and observations to decide if any additional data are needed to determine:

- Whether the child continues to have a disability that requires the provision of special education and related services;
- The child's present levels of performance and educational needs; and
- Whether there any additions or modifications needed for the child to meet the goals of the IEP and to participate, if appropriate, in the general curriculum.

If the IEP team determines that additional data are needed, those assessments will be conducted after parents are notified and parental consent has been requested. The team will review the results of assessments within 90 days of the IEP team meeting where the IEP team determined the need for additional data and use the results, as appropriate, to revise the child's IEP.

If the IEP team determines that no additional data is needed, CCPS will notify the parents of that fact, and the reasons for that determination. CCPS is not required to conduct assessments, unless requested to do so by the child's parents.

Termination of Services

CCPS must evaluate a student with a disability in accordance with federal and State regulations for evaluation before determining that the child is no longer a student with a disability. This evaluation is not required before the termination of a child's eligibility under Part B of the IDEA due to graduation with a regular high school diploma, or exceeding the age eligibility for FAPE under State law.

PART V – INDEPENDENT EDUCATIONAL EVALUATION

Definitions

- Independent Educational Evaluation means tests and assessment procedures conducted by appropriately qualified personnel not employed by CCPS responsible for the education of the child.
- Public expense means that CCPS either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parents.

Parents of a student with a disability have the right to obtain an independent educational evaluation of the child under the IDEA subject to the procedures provided below. CCPS shall provide parents, upon their request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the agency criteria applicable for an independent educational evaluation.

Public Agency Criteria

When an independent educational evaluation is at public expense, the criteria under which the independent educational evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that CCPS uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria described above, CCPS may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

A Parent's Right to Evaluation at Public Expense

Parents have the right to an independent educational evaluation at public expense if the parents disagree with an evaluation obtained by CCPS. If parents request an independent educational evaluation at public expense, CCPS must, without unnecessary delay, either:

- Initiate a due process hearing to show that its evaluation is appropriate; or
- Ensure an independent educational evaluation is provided at public expense, unless CCPS demonstrates in a due process hearing that the evaluation obtained by the parents did not meet CCPS criteria.

If CCPS initiates a hearing and the final decision is that the agency evaluation is appropriate, parents still have the right to an independent educational evaluation, but not at public expense. If parents request an independent educational evaluation, CCPS may ask parents for the reason why the parents object to the public evaluation. However, the parent's explanation is not required and CCPS may not unreasonably delay either providing the independent educational evaluation at public expense or initiating the due process hearing to defend CCPS's evaluation.

Parent-Initiated Evaluation

Parents always have the right to obtain an independent educational evaluation from qualified professionals of their choice, at their own expense. The IEP team must consider the information from parent-initiated evaluation at private expense, if it meets CCPS criteria, when making any decisions with respect to the provision of FAPE to the child. The results of parent-initiated private evaluation may also be presented as evidence at a due process hearing regarding the child.

Request for an Evaluation by a Hearing Officer

If an Administrative Law Judge (ALJ) with the Office of Administrative Hearings (OAH) requests an independent educational evaluation as a part of a due process hearing, the cost of the evaluation must be at public expense.

PART VI – INDIVIDUALIZED EDUCATION PROGRAM (IEP)

IEP Team Meetings

CCPS uses a team approach to decide whether a child is a student with a disability as defined by the IDEA and the educational needs of the child. CCPS is responsible for initiating and conducting meetings for the purposes of developing, reviewing, and revising the IEP of a student with a disability, and determining the child's educational placement. The parents of each student with a disability must be notified and afforded the opportunity to participate in any IEP team meeting conducted for their child. Parents are members of the IEP team that makes decisions regarding their child's educational placement. CCPS shall make reasonable efforts to ensure that the parents understand, and are able to participate in any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness, or whose native language is not English.

Once the IEP team determines the child requires special education and related services, the IEP team must meet within 30 days to develop the child's IEP. As a member of the IEP team, parents have the right to request a review of their child's IEP at any time.

Parent Participation in Meetings

CCPS shall take steps to ensure that one or both of the parents of a student with a disability are present at each IEP team meeting, or are afforded the opportunity to participate. Parents are to be notified of meetings early enough to ensure that they will have an opportunity to attend, and scheduling the meeting at a mutually agreed on time and place. The notice must indicate the purpose, time, location of the meeting, and who will be in attendance. The notice must also inform parents that at the discretion of the parents or CCPS, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, may participate on the IEP team. The determination of the knowledge or special expertise of any individual shall be made by the party (parents or CCPS) who invited the individual to be a member of the IEP team.

For a student with a disability beginning at age 14, or younger, if appropriate, the notice must also indicate that a purpose of the meeting will be the development of a statement of the transition services needs of the student and that the agency will invite the student. For a student with a disability beginning at age 16, or younger, if appropriate, the notice must indicate that a purpose of the meeting is the consideration of needed transition services for the student, that CCPS will invite the student, and identify any other agency that will be invited to send a representative.

Notice of any IEP team meeting to develop, review, or revise a child's IEP, including the determination of a child's educational placement must be given at least ten (10) calendar days before the meeting unless an expedited meeting is held to:

- Address disciplinary issues;
- Determine the placement of the child, if the child is a student with a disability and is not currently receiving educational services; or
- Meet other urgent needs of the child to ensure the provision of FAPE.

If neither parent can attend, CCPS shall use other methods to ensure parent participation, including individual or conference telephone calls. A meeting may be conducted without a parent in attendance if CCPS is unable to convince the parents that they should attend. The IEP team may make a placement decision without the involvement of the parents, if CCPS is unable to obtain the parental participation in the decision. In this case, CCPS must have a record of its attempts to arrange a mutually agreed on time and place, such as detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.

A meeting does not include informal or unscheduled conversations involving CCPS personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that CCPS personnel engage in to develop a proposal or response to a parent's proposal that will be discussed at a later meeting.

The IEP Team

The IEP team includes:

- The child's parents, guardian, or parent surrogate;
- At least one of the child's general education teachers, if the child is or may be participating in the general education environment. If the child does not have a general education teacher or is younger than school age, an individual qualified to teach a child of that age;
- The child's special education teacher, or if appropriate, a service provider of the child;
- A representative of CCPS who is qualified to provide, or supervise the provision of specially designed instruction to meet the needs of students with disabilities and who knows the general curriculum and public agency resources available;
- An individual who can interpret the instructional implications of evaluations. This person can be one of CCPS team members listed above;

- If parents or CCPS choose, other individuals who have knowledge or special expertise regarding the child;
- If appropriate, a representative of another public agency that may provide or pay for transition services; and
- If appropriate, the child. The child shall be invited to, and is expected to attend and participate in the IEP team meeting if the purpose of the meeting is to consider transition services needs.

IEP Development, Review, and Revision

In developing, reviewing, or revising a child's IEP, the IEP team will consider and document:

- The child's strengths and parental concerns for enhancing their child's education;
- Results of the evaluation;
- Results of the child's performance on State or district-wide assessment programs, as appropriate;
- Communication needs; and
- Assistive technology devices and services needs of the child.
- Consideration of special factors, specific to the child, such as:
    - As in the case of a child whose behavior impedes the child's learning or that of others, consider as appropriate, positive behavior intervention strategies and supports to address that behavior;
    - As in the case of a child with limited English proficiency, consider the language needs of the child as they relate to the child's IEP;
    - In the case of a child who is blind or visually impaired, provide for instruction in Braille, including textbooks in Braille, and the use of Braille unless the IEP team determines after an evaluation of the child's reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child, including textbooks in Braille; and
    - In the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

If in considering the special factors above, an IEP team determines the child needs a particular device, service, intervention, accommodation, or program modification in order for the child to receive FAPE, the IEP team must include a statement to that effect in the child's IEP.

As a member of the IEP team, a general education teacher of the child shall, to the extent appropriate, participate in the development of the child's IEP. Participation includes assisting in the determination of appropriate positive behavioral interventions and strategies for the child, and supplementary aids and services, program modifications, and supports for school personnel.

IEP Content

The IEP is developed by the team and includes:

- Present levels of educational performance, including a description of how the identified disability affects involvement and progress in the general curriculum, or for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;
- Annual measurable goals and benchmarks or short-term instructional objectives related to meeting:
  - The child's needs that result from the disability to enable the child to be involved in and progress in the
    general curriculum, or for preschool children, as appropriate, to participate in appropriate activities, and
  - Each of the child's other educational needs that result from the disability;
- Appropriate objective criteria and evaluation procedures for determining whether the annual goals are being met;
- Specialized instruction, related services and supplementary aids and services, including staffing support to be provided to the child or on behalf of the child;
- A statement of needed interventions, accommodations, or other program modifications, including a particular device or service needed in order to provide FAPE;
- Program modifications or supports for school personnel that will be provided to enable the child:
  - To advance appropriately toward the annual goals,
  - To be involved in and progress in the general curriculum,
  - To participate in extracurricular and other nonacademic activities, and
  - Be educated and participate with other students with disabilities and without disabilities;
- An explanation of the extent, if any, to which the child will not:
  - Participate with nondisabled peers, and
  - Receive specialized instruction, related services, supplementary aids and services, staffing support, interventions, accommodations, or program modifications or supports, including a particular device or service in the general education setting in order to be provided FAPE;
- A statement of any individual accommodations that are needed for the child to participate in State and district-wide assessments, and
  - If your child will not participate in a particular State or district-wide assessment, the IEP team must document why that assessment is not appropriate for the child and how the child will be assessed;
- The projected date(s) services, interventions, accommodations, or other program modifications, including a particular device or service, will start, how often they will be provided, how long they will be provided, and where they will be provided; and
- A description of how parents will be regularly informed of their child's progress toward the annual goals and the extent to which that progress is sufficient to enable the child to achieve the goals within a year.

CCPS shall provide special education and related services to a child in accordance with the child's IEP and make a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP. CCPS, teacher, or another individual shall

not be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives.

If a child requires extended school year services, the IEP must include the specific special education and related services to be provided beyond the regular school year. *Please refer to Part VII - Extended School Year Services for more specific information.*

Transition Services

Transition services are a coordinated set of activities that will promote movement from school to post-school activities, including post-secondary education, career and technology education, integrated employment, adult services, independent living, or community participation. This set of activities is based on a child's needs taking into consideration the child's preferences and interests and includes the course of study, related services, and community activities.

- Beginning when a child is 14, or younger, if appropriate, and updated annually, the IEP must include a statement of the child's transition service needs that focuses on the child's course of study.
- Beginning when a child is 16, or younger, if appropriate, the transition statement must also include a statement of interagency responsibilities or linkages, as appropriate.
- The requirement to provide transition services does not apply to a student with a disability who is convicted as an adult under State law and incarcerated in an adult correctional facility and whose eligibility for special education and related services will end before the student is eligible for release.

Placement

As a member of the IEP team, parents are included in decisions regarding placement of their child. To the maximum extent appropriate, students with disabilities, including students in public or private institutions or other care facilities, are educated with students who are not disabled.

- The educational placement for the child is determined annually, based on the child's IEP.
- Unless the child's IEP requires some other arrangement, the child is educated in the school the child would attend if not disabled.
- The IEP team may modify the child's IEP or placement if the child, convicted as an adult under State law, is incarcerated in an adult correctional facility, and the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

IEP Implementation

- The IEP must be implemented as soon as possible after it is developed, except if the meeting is held over the summer or a vacation period, or when there are circumstances that require a short delay, such as arranging transportation.
- CCPS must have an IEP in effect for the child at the beginning of the school year.
- The IEP must be accessible to every teacher, related services provider, and other

service provider who is responsible for implementing the child's IEP. Each individual identified above must be informed of their responsibilities related to implementing the child's IEP and the accommodations, modifications, and supports that must be provided.

- CCPS shall give parents a copy of their child's IEP at no cost to the parents.

Graduation Requirements

CCPS shall inform parents of the State and local graduation requirements and their child's progress toward meeting those requirements. When a student with a disability graduates from high school with a regular high school diploma, CCPS is to provide the parents notification of their child's pending graduation. Graduation with a regular high school diploma constitutes a change in placement and terminates the child's right to FAPE.

PART VII – EXTENDED SCHOOL YEAR SERVICES

Extended school year services (ESY) means the individualized extension of specific special education and related services that are provided to a student with a disability beyond the normal school year of CCPS, in accordance with the IEP, at no cost to the parents, and that meets the standards of the Maryland State Department of Education (CCPS). CCPS may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount, or duration of those services.

Extended school year services are provided if the child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE. Parents are to be notified of the availability of extended school year services that may be necessary to meet the unique needs of a student with a disability. The IEP team shall determine if any of the following factors will prevent the child from receiving FAPE from the child's educational program during the regular school year if the child does not receive extended school year services.

To determine whether the child should receive extended school year services, the IEP team shall consider:

- Whether the child's IEP includes annual goals related to critical life skills;
- Whether it is likely that the child would suffer a substantial regression of critical life skills caused by the normal school break and would fail to recover those lost skills in a reasonable time;
- The child's progress toward mastery of IEP goals and objectives;
- The presence of emerging skills or breakthrough opportunities;
- Interfering behaviors;
- The nature and/or severity of the disability; and
- Special circumstances.

PART VIII - TRANSITION FROM AN INFANTS & TODDLERS PROGRAM

CCPS and the local Infants and Toddlers Program shall invite parents to a meeting of an IEP team at least 90 days before the child's third birthday to determine if a child has a disability or developmental delay that requires the provision of special education and related services. If the IEP team determines the child is a student with a disability or developmental delay, the IEP Team shall develop an IEP for the child. The child's IEP must be in effect on the child's third birthday.

PART IX - PROCEDURES REGARDING EDUCATIONAL RECORDS

Definitions

Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Education records means the type of records covered under the definition of ''education records'' in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act [FERPA] of 1974).

Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA.

Personally identifiable information includes:

- Name of the child, child's parents, or other family member;
- Address of the child;
- A personal identifier, such as the child's social security number; or
- A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

Safeguards

CCPS shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. One official of CCPS is responsible for protecting the confidentiality of personally identifiable information. In addition to the requirements of these procedural safeguards, federal and Sate laws and regulations also govern the protection of educational records. CCPS personnel who collect or use personally identifiable information must receive training regarding the State's policies and procedures on the confidentiality of personally identifiable information. Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

Consent

Parental consent must be obtained before personally identifiable information is disclosed to anyone other than officials of participating agencies collecting or using the information under the IDEA, or for any purpose other than meeting the requirements of providing a student with a disability FAPE under the IDEA. Disclosures addressed in referral to and action by law enforcement and judicial authorities regarding reporting a crime committed by a student with a disability does not require parental consent to the extent that the transmission is permitted by FERPA.

An educational agency or institution may not release information from education records to participating agencies without parental consent unless authorized to do so under FERPA. CCPS has developed policies and procedures for public agencies, including sanctions, that the State uses to ensure that its policies and procedures are followed, and that the requirements for confidentiality, in accordance with IDEA and FERPA are met.

CCPS is required to have procedures in place for how adequate notice is provided to fully inform parents about the requirements of confidentiality of personally identifiable information including a:

- Description of the extent that the notice is given in the native languages of the various population groups in the State;
- Description of the children on whom personally identifiable information is maintained, and the types of information sought;
- Summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information;
- Description of policies and procedures used in the event that a parent refuses to provide consent; and
- Description of all of the rights of parents and children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR §99.

Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the jurisdiction of the activity.

Access Rights

CCPS shall permit parents of a student with a disability to inspect and review any education records relating to the child that are collected, maintained, or used by the agency with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child under the IDEA. CCPS shall comply with a request without unnecessary delay and before any meeting regarding an IEP, or any due process hearing, and in no case more than 45 days after the request has been made.

The right to inspect and review educational records under this section includes the right to:

- A response from the participating agency to reasonable requests for explanations and interpretations of the records;
- Request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parents from exercising the right to inspect and review the records; and
- Have a representative of the parents inspect and review the records.

CCPS may presume that parents have the authority to inspect and review records relating to their child unless CCPS has been advised that parents do not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

Record of Access

CCPS shall keep a record of individuals, other than parents and authorized employees of CCPS, obtaining access to education records collected, maintained, or used under Part B of the IDEA, including the name of the individual, the date access was given, and the purpose for which the individual is authorized to use the records. If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information. CCPS shall provide parents, on request, a list of the types and locations of education records collected, maintained, or used by the agency. CCPS may charge a fee for copies of education records that are made for parents if the fee does not effectively prevent the parents from exercising their right to inspect and review those records. CCPS may not charge a fee to search for or retrieve information from education records.

Amendment of Records at Parent's Request

Parents who believe that information in the education records collected, maintained, or used under the IDEA is inaccurate or misleading or violates the privacy or other rights of the child may request the public agency, that maintains the information, to amend the information. CCPS shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request. If the agency decides to refuse to amend the information in accordance with the request, it shall inform the parents of the refusal and advise the parents of the right to a hearing to challenge the information in educational records. A hearing conducted to challenge information in educational records must be conducted in accordance with FERPA procedures as found in 34 CFR §99.22.

CCPS shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. If, as a result of the hearing, CCPS decides that the information is inaccurate or misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parents in writing. If, as a result of the hearing, CCPS decides that the information is not inaccurate or misleading or otherwise in violation of the privacy or other rights of the child, it shall inform the parents of the right to place in the records it maintains on the child, a statement commenting on the information or setting forth any reasons for disagreeing with the decision of CCPS. Any explanation placed in the records of the child must:

- Be maintained by CCPS as part of the records of the child as long as the record or contested portion is maintained by CCPS; and
- If the records of the child or the contested portion are disclosed by CCPS to any party, the explanation must also be disclosed to the party.

Procedures for the Destruction of Information

CCPS is required to inform parents when personally identifiable information collected, maintained, or used under the IDEA is no longer needed to provide educational services to the child. The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, the student's grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

Children's Rights

CCPS has policies and procedures that afford students a right to privacy similar to that which is given to their parents and suitable to the students ages and disabilities. Under the regulations for FERPA, the parent's rights regarding their child's education records are transferred to the child once the child reaches the age of 18, unless the child's disability makes the child incompetent under State law. If the rights accorded to parents under Part B of IDEA are transferred to a student who reaches the age of majority, consistent with §300.517, the rights regarding educational records in §§300.562-300.573 must also be transferred to the student. However, CCPS must provide any notice required under section 615 of IDEA to the student and the parents.

Disciplinary Information

CCPS may include in the records of a student with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement, to the same extent that disciplinary information is included in, and transmitted with the records of nondisabled students. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If a child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child.

PART X - DISCIPLINE OF STUDENTS WITH DISABILITIES

Definitions

For purposes of this part, the following definitions apply:

- Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c).
- Illegal drug means a controlled substance, but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under the IDEA or under any other provision of federal law.

- Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

Change of Placement

For purposes of removals of a student with a disability from the child's current educational placement for disciplinary action in accordance with the IDEA and COMAR 13A.08.03, a change of placement occurs if a student with a disability is:

- Removed from the child's current placement for more that 10 consecutive school days; or
- Subjected to a series of removals that constitutes a pattern of removal that accumulates to more than 10 school days in a school year.

To determine if the removal constitutes a pattern of removal, the IEP team shall consider the:

- Length of each removal;
- Total amount of time the child is removed; and
- Proximity of the removals to one another.

Authority of School Personnel

Removal of a Student with a Disability for Not More than 10 Consecutive School Days

A student with a disability may be removed from the child's current placement for not more than 10 consecutive school days for any violation of school rules to the same extent removal is applied to students without disabilities. CCPS is not required to provide services to a student with a disability if services are not provided to students without disabilities.

Removal of a Student with a Disability for More than 10 School Days

A student with a disability may be removed from the child's current placement for up to 10 consecutive school days for each incident of misconduct in a school year, if the cumulative effect of such removals does not constitute a change of placement. For each period of removal after a student with a disability has been removed for the cumulative equivalent of 10 school days in a school year, the principal shall consult with the child's special education teacher to determine what services to provide to enable the child to appropriately:

- Progress in the general curriculum; and
- Advance toward achieving the goals of the child's IEP.

Interim Alternative Educational Setting

A child may be removed to an appropriate interim alternative educational setting for up to 45 days if:

- The child carries or possesses a weapon to school or to a school function;
- The child knowingly possesses or uses illegal drugs at school or at a school function; or
- Sells or solicits the sale of a controlled substance at school or at a school function.

The IEP team must determine the interim alternative educational setting. Any interim alternative educational setting in which a child is placed must be selected so as to enable the child to:

  - Continue to progress in the general curriculum, although in another setting;
  - Continue to receive the special education and related services, and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and
  - Receive services and modifications designed to address the behavior that resulted in the disciplinary action, so that it does not recur.

Parent Notification

On the date the principal decides to remove a student with a disability from the child's current placement for a violation of a school rule, the principal shall notify the parents of the decision and provide the parents with the procedural safeguards notice.

Functional Behavioral Assessment/Behavioral Intervention Plan

The IEP team shall meet within 10 business days of the removal of a student with a disability to develop an assessment plan, *if* the IEP team has not:

- Conducted a functional behavioral assessment; and
- Implemented a behavioral intervention plan to address the behavior before the behavior occurred, that resulted in the child's removal.

As soon as possible after the completion of assessments determined appropriate by the IEP team, the IEP team shall meet to develop appropriate behavioral interventions to address the behavior and implement the behavioral intervention plan. If the child has a behavioral intervention plan, the IEP team shall meet within 10 business days of the removal to review the behavioral intervention plan to address the behavior that resulted in the removal. The purpose is to determine if the behavioral intervention plan or the implementation of the behavioral intervention plan needs to be modified to address the behavior. For subsequent disciplinary removals of the child beyond the first 10 school days the child is removed during the school year, the IEP team shall meet to review the child's behavioral intervention plan. The IEP team shall modify the behavioral implementation plan and its implementation to the extent the IEP team determines necessary.

Authority of Hearing Officer

An administrative law judge (ALJ) may order a change in placement to an interim alternative educational setting for not more than 45 days if the ALJ in an expedited due

process hearing:

- Determines that CCPS has demonstrated by substantial evidence that maintaining the current placement of the student with a disability is substantially likely to result in injury to the child or others. As used in this part, substantial evidence means beyond a preponderance of the evidence.
- Considers the appropriateness of the child's current placement;
- Considers whether CCPS has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
- Determines that the interim alternative educational setting proposed by CCPS in consultation with the child's special education teacher must enable the child to:
  - Continue to progress in the general curriculum, although in another setting;
  - Continue to receive the special education and related services, and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and
  - Receive services and modifications designed to address the behavior that resulted in the disciplinary action, so that it does not recur.

Manifestation Determination

The IEP team shall meet to determine whether a child's behavior, that resulted in a disciplinary removal, is a manifestation of the child's disability when the child:

- Is subject to a removal that constitutes a change of placement;
- Carries or possesses a weapon at school or a school function;
- Knowingly possesses or uses an illegal drug while at school or a school function; or
- Sells or solicits the sale of a controlled substance while at school or a school function.

The IEP team shall meet within 10 school days of the date that the principal takes disciplinary action for the removal of a student with a disability, to determine:

- Whether the child's behavior that resulted in disciplinary removal is a manifestation of the child's disability; and
- The services to be provided during the removal to ensure the provision of FAPE.

This review may be conducted at the same IEP team meeting that is convened to develop an assessment plan, if the IEP team has not conducted a functional behavioral assessment and implemented a behavioral intervention plan to address the behavior before the behavior occurred, that resulted in the child's removal.

In determining whether the child's behavior was a manifestation of the child's disability, the IEP team and other qualified personnel shall consider all relevant information in relation to the behavior that resulted in the disciplinary action including:

- Evaluation and diagnostic results, including the results of other relevant information supplied by the parents of the child;
- Observations of the child; and
- The child's IEP and placement.

To determine the behavior subject to the disciplinary action is not a manifestation of the child's disability, the IEP team and other qualified personnel must determine that:

- The child's IEP is appropriate;
- Special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement;
- The child's current placement is appropriate;
- The disability did not impair the child's ability to understand the impact and consequences of the behavior; and
- The disability did not impair the child's ability to control the behavior. If any of the determinations listed above are not met, the IEP team shall consider the behavior a manifestation of the child's disability.

If the IEP team, and other qualified personnel, determines that the child's behavior is a manifestation of the child's disability, the IEP team shall, as appropriate:

- Revise the child's IEP to address needed services;
- Revise the child's behavioral intervention plan to address the behavior;
- Review the child's placement; and
- Implement services as soon as possible.

If the IEP team determines the behavior is not a manifestation of the child's disability, the child may be disciplined in the same manner as students without disabilities, including a period of suspension or expulsion, applicable to students without disabilities. The IEP team shall determine the extent to which services are necessary during the period of suspension or expulsion to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals of the child's IEP.

Upon initiation of disciplinary actions described above, the principal shall transmit the child's special education and disciplinary records to the local superintendent.

For Students Not Yet Eligible for Special Education and Related Services

A child who has not been determined to be eligible for special education and related services under the IDEA, and who has engaged in behavior that violated any rule or code of conduct of CCPS, including any behavior described above in *Authority of School Personnel* or *Authority of Hearing Officer*, the parents may assert any of the protections provided under the IDEA, if CCPS had knowledge that the child was a student with a disability before the behavior that precipitated the disciplinary action occurred.

CCPS must be deemed to have knowledge that a child is a student with a disability if:

- The parents of the child have expressed concern in writing (or orally if the parents do not know how to write or have a disability that prevents a written statement) to personnel of CCPS that the child is in need of special education and related services;
- The behavior or performance of the child demonstrates the need for these services;
- The parents of the child have requested an evaluation of the child; or

- The teacher of the child, or other personnel of CCPS have expressed concern about the behavior or performance of the child to the director of special education of CCPS, or to other personnel, in accordance with the agency's established child find or special education referral system.

CCPS would not be deemed to have knowledge that the child is a student with a disability if CCPS:

- Conducted an evaluation and determined that the child is not a student with a disability under the IDEA, or
- Determined that an evaluation was not necessary; and
- Provided parents with written notice, consistent with prior notice requirements, of its determination that the child was not a student with a disability as a result of the evaluation.

If CCPS does not have knowledge that a child is a student with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as those measures apply to students without disabilities who engage in comparable behaviors.

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined to be a student with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services to ensure the provision of FAPE.

Appeal of Decisions Related to Discipline

Except as provided below, the requirements and procedures for due process, as described in *Part XIV - Resolving Disagreements*, apply if the parents request a due process hearing to challenge a manifestation determination, made by the IEP team, that the behavior of the child was not a manifestation of the child's disability.

If the child's parents disagree with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement under the discipline procedures, the parents may request a due process hearing. If parents request a due process hearing, CCPS shall arrange for an expedited due process hearing.

In reviewing a decision with respect to the manifestation determination, the ALJ shall determine whether CCPS has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements for manifestation determination described above in *Manifestation Determination*. In reviewing a decision to place the child in an interim alternative educational setting, the ALJ shall apply the standards described above in *Authority of the Hearing Officer*. If parents request a due process hearing to challenge the interim alternative educational setting or the manifestation determination, the child must remain in the interim alternative educational setting pending the decision of the ALJ or until the end of the 45-day placement, whichever occurs first, unless the parents and CCPS agree otherwise.

If a child is placed in an interim alternative educational setting, and school personnel propose to change the child's placement after the expiration of the interim alternative educational setting, during the pendency of any proceeding to challenge the proposed change in placement, the child must remain in the child's current placement (placement prior to the interim alternative educational setting). If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, CCPS may request an expedited due process hearing.

In determining whether the child may be placed in the alternative educational setting or in another appropriate placement, the ALJ shall apply the standards described above in *Authority of the Hearing Officer*. A placement ordered by an ALJ may not be longer than 45 days. The procedure may be repeated, as necessary.

Referral to Law Enforcement and Judicial Authorities

If a student with a disability is suspected of committing a crime, CCPS may report the crime to the appropriate authorities as they would if a student without disabilities committed a like offense. Local and State law enforcement officials and judicial authorities may exercise their duties and responsibilities and apply all applicable federal and State laws to crimes, which may have been committed by a student with a disability. CCPS reporting a crime may transmit copies of the child' s special education record and disciplinary records only to the extent that the transmission is permitted by the FERPA.

PART XI - PLACEMENT OF STUDENTS IN PRIVATE SCHOOLS BY THEIR PARENTS

Placement of Children by Parents when FAPE is at Issue

The IDEA does not require CCPS to pay for the cost of education, including special education and related services, of a student with a disability at a private school or facility if CCPS made FAPE available to the child and the parents elected to place the child in a private school or facility. However, CCPS shall include the child in the population whose needs are addressed with regards to services provided to students with disabilities placed in private schools by their parents, in accordance with the federal regulations governing students with disabilities enrolled by their parents in private schools. Disagreements between parents and public agencies regarding the availability of FAPE and financial responsibility are subject to due process hearing procedures under the IDEA. *Please refer to Part XIV – Resolving Disagreements for more specific information.*

If the parents of a student with a disability, who previously received special education and related services under the authority of CCPS, enroll the child in a private preschool, elementary, or secondary school without the consent or referral of CCPS, an ALJ or a

court, may require CCPS to reimburse parents for the cost of that enrollment if an ALJ or a court finds that CCPS had not made FAPE available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate. A parental placement may be found to be appropriate by an ALJ or a court even if it does not meet the State standards that apply to education provided by public agencies.

Limitation on Reimbursement

Reimbursement may be reduced or denied by an ALJ or a court if:

- At the most recent IEP team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by CCPS to provide FAPE, including stating their concerns and their intent to enroll their child in a private school at public expense; or
- At least 10 business days (including any business days that occur on a holiday) prior to the removal of the child from the public school, the parents did not give CCPS written notice of their intent to remove the child, including their concerns regarding their child's public placement; or
- If prior to the parent's removal of the child from the public school, CCPS informed the parents, through the prior notice requirements of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or
- Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

The cost of reimbursement may not be reduced or denied for failure of the parents to:

- Inform the IEP team at the most recent IEP team meeting that the parents attended, prior to removal of the child from the public school that they were rejecting the placement proposed by CCPS to provide FAPE, including stating their concerns and the intent to enroll the child in a private school at public expense, or
- Give CCPS written notice of their intent to remove the child, including their concerns regarding the child's public placement at least 10 business days (including any business days that occur on a holiday) prior to the child's removal from the public school if:
    - The parent is illiterate and cannot write in English,
    - Compliance with the notice as described above would likely result in physical or serious emotional harm to the child,
    - The school prevented the parent from providing the notice, or
    - The parents had not received notice, under the IDEA notice requirements described above.

Students with Disabilities Enrolled by Their Parents in Private Schools

CCPS shall make special education and related services available to a child in accordance with the federal regulations for children with disabilities enrolled by their parents in private schools. No private school student with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. Decisions regarding which students receive services, what services are provided, how and where services will be provided, and how services will be evaluated are made by CCPS after consultation with appropriate representatives of private school children. If a student with a disability attending a private or religiously affiliated school will receive special education and related services CCPS will initiate and conduct meetings to develop, review, and revise a service plan for the child

If the parents of a student with a disability enroll their child in a private or religiously affiliated school, the parents' rights to file for a due process hearing applies only to child find issues. Child find is the procedure that CCPS use to identify, locate, and evaluate all students with disabilities, residing within the jurisdiction of CCPS, including children attending private and religiously affiliated schools. An individual may file a written complaint with CCPS when the individual believes CCPS has failed comply with the federal regulations under the IDEA concerning students with disabilities enrolled by their parents in private schools. *Please refer to Part XIV - Resolving Disagreements for more specific information.*

PART XII - PARENT SURROGATE

CCPS shall ensure an individual is assigned to act as a surrogate for the parents of a child when:

- No parent can be identified;
- The whereabouts of the parents cannot be located, after reasonable efforts; or
- The child is a Ward of the State.

CCPS has a procedure for determining whether a child needs a parent surrogate and for assigning a parent surrogate to the child. A parent surrogate is a person appointed by the local school superintendent to represent the child as parents would in the educational decision making process. The parent surrogate may represent the child in all matters relating to the identification, evaluation, and the educational placement of the child, and the provision of FAPE, including the appeal process.

A person selected as a surrogate:

- Cannot be an employee of any public agency that is involved in the education or care of the child;
- Must have no interest that conflicts with the interest of the child that the individual represents; and
- Is to have knowledge and skills that ensure adequate representation of the child.

CCPS may select as a surrogate an individual who is an employee of a nonpublic agency that only provides non-educational care for the child, and who has no interest that conflicts with the interest of the child the individual represents, and who has knowledge and skills that ensure adequate representation of the child. An individual is not considered an agency employee solely because that individual may be paid by an agency to serve as a foster parent or a parent surrogate.

PART XIII - TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY

Under IDEA, the parents of a student with a disability have certain rights in the special education decision making process. Under Maryland law, in certain limited circumstances, all rights accorded to the parents under IDEA shall transfer to a student with a disability. This transfer occurs when the student reaches the age of 18 years, if the student has not been adjudged incompetent under State law and there is documentation that:

- The parents are unavailable or unknown, and the child requests that the parental rights be transferred to the child rather than have a parent surrogate appointed;
- The parents have not participated in the special education decision making process for the child after repeated attempts by CCPS to involve the parents over the previous year;
- The parents have affirmatively rejected participation in the special education decision making process;
- The parents cannot participate in the special education decision making process due to prolonged hospitalization, institutionalization, or serious illness or infirmity of one or both of he parents and the parents have consented to the transfer of rights to the child;
- The parents cannot participate in the special education decision making process due to extraordinary circumstances beyond their control, and the parents have consented to the transfer of rights to the child; or
- The child is living outside of the parents' home and is not in the care or custody of another public agency.

If the parents of a student with a disability, with whom the child resides, do not consent to the transfer of rights to the child at the age of 18, and the student has not been adjudged incompetent under State law, either party may file for due process to determine whether the rights should be transferred.

If a student with a disability has been represented by a parent surrogate in accordance with federal and State laws and regulations, CCPS shall provide any written notice required under federal and State laws and regulations to both the student and parent surrogate. All other rights afforded the parent surrogate under IDEA shall transfer to the student if the student has not been adjudged incompetent under State law and the student requests that the rights transfer to the student.

PART XIV RESOLVING DISAGREEMENTS

Written Complaint Procedures

CCPS has adopted written complaint procedures for resolving complaints filed by an individual or organization. CCPS disseminates the State's procedures for resolving complaints to parents and other interested individuals including Parents' Place of Maryland, advocacy agencies, independent living centers, and other appropriate entities. Individuals may obtain a copy of the State complaint procedures by sending a written request addressed to the Division of Special Education/Early Intervention Services, MSDE, 200 West Baltimore Street, Baltimore, Maryland 21201. The procedures are also available on the MSDE web-site: www.MSDE.state.md.us.

Filing a Written Complaint with MSDE

If an individual or an organization believes that a federal or State law or regulation concerning the identification, evaluation, the educational placement of the child, and the provision of FAPE, including the appeal process is not being followed, an individual or organization has the right to file a written and signed complaint with the Assistant State Superintendent, Division of Special Education/Early Intervention Services, MSDE, 200 West Baltimore Street, Baltimore, Maryland 21201.

The written complaint shall include:

- A statement that CCPS has violated a requirement of federal or State law or regulation; and
- The facts upon which the statement is based.

This must include any documentation supporting the allegation(s). Complaints must be filed within one (1) year of the date that the alleged violation occurred, unless a longer period is reasonable because the violation is continuing. If the complainant is requesting compensatory services, the complaint must be received within three (3) years of the date of the alleged violation. MSDE is to investigate and issue their findings within 60 calendar days of receipt of the written complaint. MSDE may permit an extension of the 60-day timeline only if exceptional circumstances exist regarding a particular complaint.

At a minimum, MSDE shall:

- Conduct an independent on-site investigation if CCPS determines an investigation is necessary;
- Provide the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
- Review all relevant information and make an independent determination as to whether CCPS has violated requirements of federal and State laws or regulations concerning the identification, evaluation, the educational placement of the child, and the provision of FAPE; and
- Issue a written decision to the complainant that addresses all allegations in the complaint and contains findings of fact and conclusions, and the reasons for the final decision of MDSE. The final decision shall include procedures for the effective implementation of the final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance.

Resolving A Complaint

In accordance with MSDE's general supervisory authority under the IDEA, if MSDE determines CCPS has failed to provide appropriate services, the final written decision shall include how CCPS is to remediate the denial of those services, including, as

appropriate, the awarding of monetary reimbursement or other corrective action(s) appropriate to the needs of the child and provide appropriate future services for all students with disabilities.

Complaints and Due Process Hearings

If MSDE receives a written complaint that is also part of a due process hearing, or if a written complaint contains multiple issues of which one or more are part of a hearing, MSDE must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of that due process hearing. However, any issue in the complaint that is not part of the due process hearing must be resolved using the timeline and procedures described above. If an issue is raised in a complaint that has previously been decided in a due process hearing, involving the same parties, the hearing decision is binding, and MSDE shall inform the complainant to that effect. A complaint alleging CCPS has failed to implement a due process hearing decision shall be resolved by MSDE.

Mediation Procedures

Each public agency must ensure that procedures are established and implemented to allow parties (parents or public agencies) to appropriately resolve disputes involving any matter concerning the proposal, refusal, or consent for identification, evaluation, educational placement, the provision of a FAPE, or disciplinary procedures through a mediation process. At a minimum, mediation must be available whenever a due process hearing is requested. The procedures must ensure that the mediation process is a voluntary process available to either parents or CCPS. The request for mediation may not be used to deny or delay either party's rights under federal or State laws or regulations.

An employee of the Office of Administrative Hearings (OAH), selected on a rotating basis, who is qualified, impartial, and trained in effective mediation techniques, conducts mediation. An individual who serves as a mediator is not an employee of CCPS or State agency responsible for the provision of services to students with disabilities, or CCPS. A mediator must not have a personal or professional conflict of interest. A person who otherwise qualifies as a mediator is not an employee of CCPS or State agency responsible for the provision of services to students with disabilities, or CCPS, solely because that individual is paid by the State to serve as a mediator.

- CCPS pays for the costs of the mediation process, including the cost of a meeting with parents to encourage mediation.
- CCPS maintains a list of qualified mediators who are knowledgeable of the laws and regulations related to the provision of special education and related services.
- A request for mediation is made in writing to CCPS responsible for the education of the child. The Mediation/Due Process Request Form, developed by MSDE and OAH, is available from the public agency where the child attends school. For assistance contact CCPS's special education office.
- Within three (3) days of receipt of the written request for mediation it is the responsibility of CCPS to send a facsimile (fax) of the written request to the OAH.

- Parents or CCPS may be accompanied and advised by counsel during mediation.
- A mediation session will be scheduled to occur within 20 days of the receipt of a written request at a location convenient to parents and CCPS.
- Mediation sessions are closed proceedings. Discussions that occur during mediation must be confidential and cannot be used as evidence in any subsequent due process hearing or civil action. Parents or CCPS may be asked to sign a confidentiality pledge before the start of the mediation.
- An agreement reached by the parties to the dispute in the mediation process must be set forth in a written mediation agreement.

Meeting to Encourage Mediation

CCPS may establish procedures to require parents who elect not to use the mediation process to meet at a time and location convenient to the parents, with a disinterested party, who is under contract with the Parents' Place of Maryland, Inc., Families Involved Together, Inc., or an appropriate alternative dispute resolution entity who would explain the benefits of the mediation process and encourage parents to use the process. CCPS may not deny or delay the parents right to a due process hearing if parents fail to participate in the meeting to encourage the use of mediation.

Due Process Hearings

Parents or CCPS may initiate a due process hearing on any matter relating to the proposal, refusal or consent for identification, evaluation, educational placement, and the provision of FAPE, or disciplinary issues. *Please refer to Part X – Discipline of Students with Disabilities for more specific information.* Whenever a due process hearing is initiated, CCPS shall inform the parents of the availability of mediation. CCPS is to give parents a copy of all procedural safeguards and inform parents of free or low-cost legal and other relevant services in the area. At any time, upon the request of parents, CCPS is to provide parents with information about available free or low-cost legal and other relevant services in the area.

Parent Notice

The Mediation/Due Process Hearing Request Form, developed by MSDE and OAH, is available from CCPS where the child attends school. CCPS may not deny or delay the parents right to a due process hearing because the parents failed to provide a written request. For assistance completing the form, contact CCPS's special education office. A request for a due process hearing made by the parents or the attorney representing the child must be made in writing to CCPS responsible for the education of the child and include:

- The name of the child;
- The address of the residence of the child;
- The name of the school the child is attending;
- A description of the problem(s) or area(s) of disagreement related to what CCPS is proposing, refusing, or changing, including facts relating to the problem; and
- A proposed resolution for the problem or disagreement to the extent known and

available to the parents at the time.

Within three (3) days of receipt of the written request for a due process hearing, it is the responsibility of CCPS to send the facsimile (fax) of the written request to OAH. Upon the initiation of a due process hearing, it is also the responsibility of OAH to inform parents of free or low-cost legal and other relevant services in the area. CCPS is responsible for informing parents of information regarding the possible reimbursement of attorneys' fees incurred as a result of a due process hearing or court action. *Please refer to Part XV - Attorneys' Fees for more specific information.*

Impartial Hearing Officer

OAH will assign an ALJ to serve as an impartial hearing officer from a list of ALJs approved to serve. The list must include a statement of the qualifications of each of those persons. An ALJ is not an employee of CCPS or any public agency involved in the education or care of the child and shall not have any personal or professional interest which would conflict with objectivity in the hearing. The ALJ is not an employee of CCPS solely because the ALJ is paid as a hearing officer. OAH will schedule the due process hearing to be conducted within 30 days of receipt of the written request. OAH will notify parents and CCPS of the right to mediation, if mediation has not been requested.

An ALJ shall conduct the due process hearing according to the requirements of applicable federal and State laws and regulations. During a due process hearing, an ALJ may:

- After the review of the educational record of the child, dismiss any request for a review, which does not relate to a matter involving the identification, evaluation, educational placement of a student, or the provision of FAPE;
- Require the parents and CCPS to participate in a pre-hearing conference prior to the due process hearing;
- Hear any testimony that it considers relevant;
- Require an independent evaluation and/or call upon an impartial expert witness in the diagnosis or education of students with disabilities whose testimony shall be on the record and whose costs shall be paid by CCPS.

Due Process Hearing Rights

Any party to a due process hearing has the right to:

- Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities;
- Present evidence and confront, cross-examine, and compel the attendance of witnesses;
- Prohibit the introduction of any evidence at the hearing, that has not been disclosed to that party at least five (5) business days before the hearing;
- Obtain a written, or at the option of the parents, an electronic verbatim record of the hearing; and

- Obtain a written, or at the option of the parents, an electronic findings of fact and decisions.

At least five (5) business days prior to the hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the party's evaluations that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendations at the due process hearing without the consent of the other party.

Parental Rights at a Due Process Hearing

Parents involved in due process hearings must be given the right to have the child who is the subject of the hearing present and open the hearing to the public. The record of the hearing and the findings of fact and decisions must be provided at no cost to the parents. The parents have the right to inspect and review, at reasonable times, before a due process hearing any education records relating to the child, as described in *Part IX - Procedures Regarding Educational Records.*

Timelines and Convenience of Due Process Hearings

- The ALJ is required to make a final decision and the decision must be mailed to the parents and CCPS within 45 days of receiving the written request for a hearing.
- An ALJ may grant specific extensions of time beyond 45 days at the request of either party.
- The ALJ is to transmit a copy of the hearing decision to CCPS upon the close of the hearing record.
- Each due process hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and the child involved.
- The CCPS shall transmit the decision(s) to the State Advisory Committee and make decisions available to the public, in a manner consistent with State and federal confidentiality requirements, after removing personally identifiable information.

Expedited Due Process Hearing

If, at the time of the request for a due process hearing, the child is not enrolled and attending an educational program or the request for a due process hearing involves a disciplinary issue, an expedited hearing will be scheduled. An expedited due process hearing shall meet the requirements of the due process hearing rights described above. Regardless of which party (parents or CCPS) requests an expedited due process hearing the timeline shall be the same. All requests for an expedited due process hearing will be considered by OAH. An expedited due process hearing shall be held within 20 days of receipt of a written request and a written decision will be issued within 15 days of the expedited due process hearing.

Child's Status During Proceedings

The child will stay in the child's present educational setting pending administrative and judicial proceedings unless the parents and CCPS agree otherwise. If initial admission to public school is involved, the child must be placed in public school, if the parents consent, pending the completion of all administrative and judicial proceedings, unless the parents and CCPS agree otherwise. If in a decision of an ALJ, the ALJ agrees with a child's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State or CCPS and the parents of the child. For information on placement during appeals of disciplinary action, *Please refer to Part X - Discipline of Students with Disabilities for more specific information.*

Civil Action

An ALJ decision is final unless appealed by either the parents or CCPS. Any party aggrieved by the findings and decisions has the right to bring a civil action with respect to the complaint presented in the due process hearing. Parents may file for civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 180 days of the issuance of the final decision. Nothing in this part restricts or limits the rights, procedures, and remedies available under the Consitution, The Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of students with disabilities. Except, that before filing for civil action under these laws the parents or CCPS must have exhausted the procedures for a due process hearing with OAH under section 615 of the IDEA.

In any action, the court will:

- Receive the record of the due process hearing;
- Hear additional evidence at the request of either the parents or CCPS;
- Base its decision on the preponderance of evidence; and
- Grant the relief it determines to be appropriate.

PART XV – ATTORNEYS' FEES

In any action or proceeding brought under section 615 of the IDEA, a court may award reasonable attorneys' fees as part of the costs to the parents of the student with a disability that is the prevailing party. Funds under Part B of the IDEA may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the IDEA. This does not preclude CCPS from using funds under Part B of the IDEA for conducting an action or proceeding under section 615 of the IDEA. Because the parent's right to recover attorneys' fees depends upon meeting certain conditions set out in the IDEA, parents should discuss this matter with their attorney.

A court awards reasonable attorneys' fees consistent with the following:

- Fees awarded under section 615(i)(3) of the IDEA must be based upon the prevailing rate in the community in which the action or proceeding arose for the kind and quality of services furnished.
- No bonus or multiplier may be used in calculating the fees awarded.

Prohibition of Attorneys' Fees and Related Costs

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the IDEA for services performed subsequent to the time of a written offer of settlement to the parents if:

- The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
- The offer is not accepted within 10 days; and
- The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation that is conducted prior to the filing of a request for a due process hearing. Notwithstanding the prohibition of attorneys' fees and related costs described above, an award of attorneys' fees and related costs may be made to parents who are the prevailing party and who were substantially justified in rejecting the settlement offer.

Reduction in Attorneys' Fees or Related Costs

The court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the IDEA, if the court finds that:

- The parents, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
- The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
- The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
- The attorney representing the parents did not provide CCPS the appropriate information in the written request for a due process hearing, as required.

Exception to Reduction in Attorneys' Fees or Related Costs

A reduction in attorneys' fees or related costs does not apply if CCPS:

- Unreasonably delayed the final resolution of the due process hearing or judicial proceeding; or
- Was in violation of section 615 of the IDEA.

FREE AND LOW COST LEGAL SERVICES

1. Advocates for Children and Youth 1-410-547-9200
2. Lawyer Referral Services 1-800-233-7201
3. Legal Aid Bureau, Inc. 1-800-679-8813
4. Maryland Coalition for Inclusive Education (MCIE)
   1-410-859-5400
5. Maryland Disability Law Center (MDLC)
   1-800-233-7201
6. Maryland Volunteer Lawyers Services
   1-800-510-0050
7. University of Maryland Law Clinic
   1-410-706-2015 & 410-706-8036 (TDD)
8. Lawyer Referral Service of Carroll County
   1-800-649-1090
9. Maryland State Department of Education
   Division of Special Education/Early Childhood
   1-410-767-0244
10. Samuel Sperling 1-410-653-0141

RECEIPT OF PARENTAL RIGHTS DOCUMENT

NAME OF STUDENT: ______________________________

DATE OF BIRTH: ____/____/____

SCHOOL: ______________________________

This is to verify that I have received a copy of Procedural Safeguards, Parental Rights which includes the procedural safeguard provisions of the IDEA Amendments of 1997, (the educational decision-making process). These rights have been explained to me by:

______________________ ______________________

Name **Position**

____/____/____

Date

I understand that my rights include the right to receive:

(1) this and all other written notices in the language I understand (primary language) or if needed, a translation of such orally, in sign language, or in braille as appropriate, and

(2) answers from school personnel to additional questions I may have.

(3) a copy of the complete procedural safeguards, at a minimum, upon the initial referral of my child for an evaluation, with each notice of a meeting to develop, reviews, or revise my child's IEP, with each notice of a reevaluation; and if I file a written request for a due process hearing.

My signature below indicates that I received the booklet and understand its contents.

Signature of Parent / Parent Surrogate / or Guardian: ______________________

Date Signed: ____/____/____

CCPS/CCPS REVISION AUGUST/SEPTEMBER2002
IDEA AMENDMENTS 1997 (PL 105-17) HTF - 09/01/02

APPENDIX B

COUNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL EDUCATION

INDIVIDUALIZED EDUCATION PROGRAM (IEP)

☐ Initial IEP
☑ Review / Revision

Date: 10/15/01

☒ Proposed Copy
☐ Approved Copy

tion 1. Student Information

udent:
Present School:
Grade at IEP Development / Review: 3
Case Manager: Mary Ellen Stephens
Date of Birth:
Home School: Mitchell Elementary
Disability Code: 14

Section II. Dates

Date of IEP Development / Review Meeting: 10/15/01
Date of Most Recent Evaluation: 8/15/01
(Meeting to review results)
Annual Review Deadline: 10/15/02
Other Review Dates: 5/14/01
Date of Initial IEP: 9/27/96
Projected Date of Reevaluation: 10/17/03
(Meeting to review results)

Section III. Present Level of Educational Performance, including explanation, *IN EACH AREA AFFECTED BY THE DISABILITY*

READING Measured Level (s): readiness AE 2-6 6/99 Brigance	**Description of abilities and difficulties / explanation of measured level (s)** Strength: looking at pictures, naming pictures, naming actions in pictures, recognizes first name, matches letters in first name, follows picture schedule 1-4 items, familiar with classroom routine, discriminates letters A-P	discriminating name in a group, spelling name orally, matching alphabet letters, recognizing functional sight words
MATH AE 1-6 6/99 Brigance PEP-R overall 25 month devel. age	rote counts 1-5, gives "one," counts 1-5 objects, big/little, "all," in, out, on, up, down, discriminates numbers 1-10	more/less, rote counting 1-10, long/short, same/different, more/less, coin recognition, number identification 1-20, number in a set.
WRITTEN EXPRESSION AE 1-6 9 LAP-D	scribbles, imitates verticle and horizontal line, holds crayon to mark	imitating circle & cross, holding crayon/pencil with fingers, connecting dots to make lines and shapes
ECH	improved production of s & f, has g & k in initial position, but not in final, improved tolerance of lip pressure	misarticulates w, n, l, th, z, l blends, has trouble lifting and lateralizing tongue
LANGUAGE	combines 2, 3 and 4 words into meaningful phrases, improved comprehension of concepts and literal questions or role questions	expand use of pronouns, adjectives, prepositions, and negations, ask simple questions, part to whole relationships
SOCIAL / EMOTIONAL / BEHAVIORAL		
COGNITIVE / INTELLECTUAL Leiter-R Brief IQ 48 mod delay, Vineland 48 Low 8/15/01 CARS 8/31/00	**(including adaptive behavior, requisite learning behaviors, etc., as appropriate)** relative strengths; concrete reasoning and perceptual skills	Weaknesses; abstract reasoning, nonverbal concept formation, significant level of distractibility, adaptive behavior deficits non-autistic range on the CARS with score of 27.5 a score of 30-36 would fall in the mild to moderate range
MOTOR OT	removing shoes & socks, scribbles on paper, beginning to tolerate various positions and sensory input	improve ADL functioning, improve fine motor skills for classroom performance
PT	improving balance, mobility, posture, walks independently and safely on level surfaces	functional mobility, postural alignments, basic locomotor components
VOCATIONAL Adapted PE	basic knowledge of object control skills - elementary stages demonstrated	locomotor skills, balance, basic coordination

Measured Level: SS = Standard Score
3 - Part White - Student File Yellow - Parent Pink - Teacher

Part 1 of 31 Pages
Ref: V: Content of IEP SE170 (8/99)

BEST AVAILABLE COPY

UNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL ED

INDIVII D EDUCATION PROGRAM (IEP)
Section NUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*
☒ Proposed Copy
☐ Approved Copy

Student:
Area: ***Reading***
Service Provider: ***special education instructional team***

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate early spelling and language arts skills	progress on or mastery of 8/8 short term objectives data collection	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. select first and last name in print out of a field of 8 names: A. from a list of names B. in classroom environment (ie. on cubbie, chair)	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
2. spell first and last name both orally and in print	90 % accuracy adaptive keyboards, manipulatives ie. rubber stamp across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
3. match upper case alphabet letters	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
4. idendify upper and lower case alphabet letters	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

Student File Parent Teacher Ref V: Content of IEP SE 170 (7-00)

UNTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL E ..ON

INDIV ED EDUCATION PROGRAM (IEP)
Section . .NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy ☐ Approved Copy

Service Provider: *special education instructional team*

Student:

Area: *Reading*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
5. match 5 environmental sight words or logos	90% accuracy	1/29/02			
		4/11/02			
	across data collectors	6/12/02			
		10/15/02			
6. describe the body parts for each of the five senses	90% accuracy	1/29/02			
		4/11/02			
	across data collectors	6/12/02			
		10/15/02			
7. describe/tell the role of 20 occupations	90% accuracy	1/29/02			
		4/11/02			
	across data collectors	6/12/02			
		10/15/02			
8. use the sense of touch to identify 25 everyday objects that are out of sight.	90% accuracy	1/29/02			
		4/11/02			
	across data collectors	6/12/02			
		10/15/02			

UNTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL EI N

INDIVI ED EDUCATION PROGRAM (IEP)
Section ı .NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy ☐ Approved Copy

Service Provider: *special education instructional team*

Student:

Area: *Math*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate early math concepts	progress on or mastery of	1/29/02			
	11/11 short term objectives	4/11/02			
	data collection	6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. identify the colors red, yellow, orange, blue, green, purple, black, brown, white	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
2. name the colors red, yellow, orange, blue, green, purple, black, brown, white	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
3. rote count from 1 to 10	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
4. match non-identical numbers 1 through 10 (ie. typed, handwritten, 3-d shapes)	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

INTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL ED

INDIVII ED EDUCATION PROGRAM (IEP)
Section I\ NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	☐ Approved Copy
Service Provider:	*special education instructional team*		

Student:

Area: *Math*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
5. name numbers 1 through 10	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
6. identify: A. long/short B. same/different c. more/less	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
7. identify: A. coins (penny, nickel, dime, quarter) B. match coins	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
8. name basic shapes (circle, square, triangle, rectangle, heart, star)	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

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INDIV ED EDUCATION PROGRAM (IEP)
Section NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	☐ Approved Copy
Service Provider:	*special education instructional team*		

Student:

Area: *Math*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
9. identify shapes of objects found in the environment (circle, square, triangle, rectangle - ie. a plate is a circle, a book is a rectangle)	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
10. select the next item in a 2 - part alternating pattern	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
11. give a specified number of objects on request - 1 through 5	90% accuracy	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

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DEPARTMENT OF SPECIAL ED N

INDIVI ZED EDUCATION PROGRAM (IEP)
Section NUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: 10/15/01

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Service Provider: special education instructional team

Student:

Area: Functional Life Skills

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate improved functional life skills	progress on or mastery of 6/6 short term objectives data collection	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. remain with a group that is moving during transitions	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
2. independently finish toileting task by: A. wiping with assistance B. pulling up pants	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
3. wash and dry hands following a picture schedule with up to 3 verbal prompts to continue	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
4. remain seated while eating with verbal prompts	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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DEPARTMENT OF SPECIAL ED 4

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: 10/15/01

☒ Proposed Copy ☐ Approved Copy

Service Provider: special education instructional team

Student:

Area: Functional Life Skills

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
5. walk independently to a familiar location within a building	90% of the time across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
6. maintain indicating the need to toilet independently	100% across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

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Service Provider: *special education instructional team*

Student:

Area: ***Social - Personal Management***

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate social and personal management skills up to the kindergarten level	progress on or mastery of 15/15 short term objectives data collection	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks **The student will:**					
1. follow a picture schedule for daily or "work" activities including 5 - 10 pictures with: A. verbal prompting B. without prompting	90% of the time across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
2. follow 2 step directions given to a small/large group for: A. routine activities (clean up, line up, pack up) B. instructional activities with visual cues	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
3. attend to a presented task for 5 minutes in a small/large group by: answering questions, gathering & manipulating materials, attend during turn taking	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
4. remain seated for a work task up to 10 minutes duration without prompts	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

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Service Provider: *special education instructional team*

Student:

Area: ***Social - Personal Management***

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks **The student will:**					
5. get an adult's attention by raising hand to: A. obtain assistance B. respond to a question	90% of the time across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
6. engage in play activities with appropriate eye gaze with 1-3 peers for 5 minutes on a daily basis to include: catch, hand games, songs/fingerplays, pretend play, board games, or free choice	90% accuracy with adult facilitation across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
7. choose a toy from a field of four and follow through with the choice for 5 minutes: A. with facilitation B. independently	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
8. participate in small group games with 1-3 children for 2-5 minutes by: A. attending to games B. taking turn appropriately C. acknowledging whose turn it is (my turn/your turn)	90% accuracy across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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DEPARTMENT OF SPECIAL ED'

INDIVIL ZED EDUCATION PROGRAM (IEP) Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS		Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	Approved Copy
Student:	Area: *Social - Personal Management*	Service Provider:	*special education instructional team*		

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
9. imitate non-verbal actions when given an adult model (running, walking on a line, balance beam, up/down steps, jumping, skipping)	90% of the time	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
10. play "Simon Says" and/or "follow the leader" using actions (running, walinking on a line, skipping, jumping, walking on balance beam: A. adult model B. peer model	90% accuracy	1/29/02			
	with adult facilitation	4/11/02			
		6/12/02			
	across data collecjors	10/15/02			
11. participate vedrbally throughout the day in a small group by: A. responding to direct questions B. sharing a personal experience C. asking relevant questions	90% accuracy	1/29/02			
	using 3-4 word sentences	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
12. gain peer attention by: A. using peer's name and looking at them B. using peer's name and making verbal request (play with me) C. use appropriate social greetings	90% of the time	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

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DEPARTMENT OF SPECIAL ED'

INDIVII ZED EDUCATION PROGRAM (IEP) Section IV. ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS		Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	Approved Copy
Student:	Area: *Social - Personal Management*	Service Provider:	*special education instructional team*		

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
13. 1 time per day participate in verbal turn taking with peers in unstructured times for 2-3 turns	90% accuracy	1/29/02			
	on topic with appropriate	4/11/02			
	eye gaze	6/12/02			
	across data collectors	10/15/02			
14. refrain from placing fingers, hands and other inappropriate objects in mouth	100% of the time	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
15. decrease perseverative "chatter" regarding irrelevant topics during instructional activities	50% below baseline	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

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INDIVII ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy ☐ Approved Copy

Service Provider: *speech therapist*

Student:

Area: *Language*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate correct use of targeted semantic, morphologic, syntactic, and pragmatics skills in the educational setting	progress on or mastery of 13/13 short term objectives	1/29/02			
		4/11/02			
	data collection	6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. use adjective/noun combinations to describe objects and pictures (eg. big ball, wet towel)	85% accuracy	1/29/02			
	verbal & visual cuing	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
2. make 1-3 appropriate spontaneous comments related to a play/therapy activity	85% accuracy	1/29/02			
	verbal & visual cuing	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
3. demonstrate understanding of the concepts: in front, behind, side, next to	85% accuracy	1/29/02			
	verbal & visual cuing	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
4. follow a 2 step direction involving familiar concepts, objects, and motor actions	85% accuracy	1/29/02			
	verbal & visual cuing	4/11/02			
		6/12/02			
	across data collectors	10/15/02			

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INDIVIE ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

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Service Provider: *speech therapist*

Student:

Area: *Language*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
5. ask peers/adults simple questions related to topic of conversation	85% accuracy	1/29/02			
	visual & verbal cues	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
6. use 3-4 word phrases to express negation in spontaneous speech (don't, not, no)	85% accuracy	1/29/02			
	visual & verbal cues	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
7. discriminate plurals: A. identify object(s) B. name object(s)	85% accuracy	1/29/02			
	visual & verbal cues	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
8. use regular past tense verb formations	85% accuracy for 10 vverbs	1/29/02			
	3 step picture stories	4/11/02			
		6/12/02			
	across data collectors	10/15/02			

JNTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL ED

INDIVID ZED EDUCATION PROGRAM (IEP) Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS	Date of IEP Meeting: *10/15/01*	☒ Proposed Copy Approved Copy
	Service Provider: *speech therapist*	
Student:	Area: *Language*	

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks **The student will:**					
9. add information to clarify a previous comment or question when prompted to do so	85% accuracy visual & verbal cues across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
10. verbally request permmission and wait for permission to be granted (may I have, may I go..., may I do..)	85% accuracy visual & verbal cues across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
11. play simple games with the clinician and/or other students	4 turns per game, 85% of the time with visual & verbal cues across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			
12. respond to who, what, where, and when questions about pictures and short stories (4 - 5 sentences)	85% accuracy visual & verbal cues across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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DEPARTMENT OF SPECIAL ED

INDIVIL ZED EDUCATION PROGRAM (IEP) Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS	Date of IEP Meeting: *10/15/01*	☒ Proposed Copy Approved Copy
	Service Provider: *speech therapist*	
Student:	Area: *Language*	

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks **The student will:**					
13. maintain the topic of conversation for 3 turns with an adult speaker	85% accuracy visual & verbal cues across data collectors	1/29/02 4/11/02 6/12/02 10/15/02			

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INDIVII ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

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Service Provider: *speech therapist*

Student:

Area: *Articulation*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will produce targeted sounds in words	progress on or mastery of	1/29/02			
	8/8 short term objectives	4/11/02			
	data collection	6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks **The student will:**					
1. produce the /n/ sound in isolation and in words	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
2. produce the /w/ sound in isolation and in words	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
3. produce the /t/ sound in isolation and in words	90% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
4. produce /k/ sound in final position in words	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			

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DEPARTMENT OF SPECIAL ED' N

INDIVII ZED EDUCATION PROGRAM (IEP)
Section IV. ..NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

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Service Provider: *speech therapist*

Student:

Area: *Articulation*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks **The student will:**					
5. produce /g/ sound in the final position in words	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
6. produce the /l/ sound in all positions in all words and sentences	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
7. produce the vowel phonemes /a/, /u/, /i/, /ai/, /oi/	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			
8. imitate vowel - consonant strings of increasing length and complexity	80% accuracy	1/29/02			
	mirror work, modeling,	4/11/02			
	tactile cues	6/12/02			
	across data collectors	10/15/02			

JNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL ED'

INDIVII ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*
☒ Proposed Copy
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Service Provider: *speech therapist*

Student:

Area: *Oral - Motor*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	**Procedure and Criteria for Completion**	**Scheduled Review Date**	**Date Reviewed**	**Result of Evaluation**	**Comments**
will use oral motor movements necessary to produce intelligible speech	progress on or mastery of 4/4 short term objectives	1/29/02			
		4/11/02			
	data collection	6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. allow deep pressure to be applied to the articulators for up to 15 seconds	70% accuracy	1/29/02			
	mirror, food, oral motor toys	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
2. lift tongue to the alveolar ridge	70% accuracy	1/29/02			
	mirror, food, oral motor toys	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
3. move tongue in imitation and on command: A. in and out of mouth B. side to side of mouth	70% accuracy	1/29/02			
	mirror, food, oral motor toys	4/11/02			
		6/12/02			
	across data collectors	10/15/02			
4. identify articulator being touched (lips, teeth, tongue, cheek) without a visual cue	70% accuracy	1/29/02			
	food, oral motor toys	4/11/02			
		6/12/02			
	across data collectors	10/15/02			

JNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL ED'

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*
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Service Provider: *occupational therapist*

Student:

Area: *Fine Motor*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	**Procedure and Criteria for Completion**	**Scheduled Review Date**	**Date Reviewed**	**Result of Evaluation**	**Comments**
A. will demonstrate improved functional shoulder, arm, and hand control for greater success with fine motor classroom manipulatives	progress on or mastery of 7/7 short term objectives	1/29/02			
		4/11/02			
		6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. stabilize with one hand while using other to complete the following tasks: A. color within shapes B. pour liquid from container into large cup C. open and close assorted lids	4/5 times with 1-2 verbal prompts	1/29/02			
		4/11/02			
		6/12/02			
	data collection	10/15/02			
2. using dominant hand, will follow peg designs on pegboard involving crossing the midline	3/5 times with 1-2 verbal prompts	1/29/02			
		4/11/02			
		6/12/02			
	data collection	10/15/02			
3. demonstrate improved coordination by catching a playground ball	3/3 times with 1-2 verbal prompts	1/29/02			
		4/11/02			
		6/12/02			
	data collection	10/15/02			
4. pick up small manipulatives (pennies, stick pegs, knobbed pegs) using only the thumb, index and middle fingers	100% of the time	1/29/02			
		4/11/02			
		6/12/02			
	data collection	10/15/02			

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DEPARTMENT OF SPECIAL ED

INDIVID ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy ☐ Approved Copy

Service Provider: *occupational therapist*

Student:

Area: *Fine Motor*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
goal A. continued					
Short-Term Objectives/Benchmarks **The student will:**					
5. demonstrate a radial pincer grasp to handle snaps and clothespins	4/5 times with 3-4 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			
6. using preschool scissors and positioning from an adult, will cut on straight and curved 3 inch bold lines within 1/4 inch	4/5 times with 3-4 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			
7. using a radial lateral grasp on a tool, will imitate a circle and cross	5/5 times with 1-2 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			

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DEPARTMENT OF SPECIAL ED

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy ☐ Approved Copy

Service Provider: *occupational therapist*

Student:

Area: *Self Care*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
B. will show improved independence in self care skills	Progress on or mastery of 5/5 short term objectives	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks **The student will:**					
1. put on and pull off shirt with self-correction	100% with 1-2 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			
2. put on lower body clothing	100% with 1-2 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			
3. put on shoes and socks	100% with stand by assistance with only initial prompt data collection	1/29/02 4/11/02 6/12/02 10/15/02			
4. independently self feed with a spoon and fork	75% of bites data collection	1/29/02 4/11/02 6/12/02 10/15/02			

INTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL ED

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV. ..NNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	Approved Copy
Service Provider:	*occupational therapist*		

Student:

Area: *Self Care*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
Goal B. continued					
Short-Term Objectives/Benchmarks **The student will:**					
3. successfuly manipulate the following fasteners on and off self A. unbutton large buttons 4/4 B. button large buttons 4/4 C. unsnap coat or jacket 4 snaps D. snap on coat 4 snaps	with physical assist and 1-2 verbal prompts data collection	1/29/02 4/11/02 6/12/02 10/15/02			

Student File Parent Teacher Ref V: Content of IEP SE 170 (7-00)

INTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL ED

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting:	*10/15/01*	☒ Proposed Copy	Approved Copy
Service Provider:	*occupational therapist*		

Student:

Area: *Sensory Motor*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
C. to demonstrate the use of sensory information to understand and effectively interact with people and objects in school	Progress on or mastery of 2/2 short term objectives	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks **The student will:**					
1. participate in various tactile activities (such as sand, clay, glue, fingerpainting, food preparation, and finger feeding)	without behavioral overreactions, 80% of the time data collection	1/29/02 4/11/02 6/12/02 10/15/02			
2. accept direct and incidental touch (head, hair, mouth)	without verbal, physical, or behavioral overreaction 100% of the time data collection	1/29/02 4/11/02 6/12/02 10/15/02			

Student File Parent Teacher Ref V: Content of IEP SE 170 (7-00)

INTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL EDI

INDIVIL ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy

Approved Copy

Service Provider: *occupational therapist*

Student:

Area: *Motor Planning*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
D. will demonstrate improved eye regard and motor planning abilities for greater independence in the school setting	Progress on or mastery of 3/3 short term objectives	1/29/02 4/11/02 6/12/02 10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. with sensory input, will remain focused on activity for 5-10 minutes with one verbal prompt	4/5 times data collection	1/29/02 4/11/02 6/12/02 10/15/02			
2. follow through on 3 step obstacle course involving movement changes to body	3/5 times with 1 physical prompt and 1-2 verbal cues	1/29/02 4/11/02 6/12/02 10/15/02			
3. visually scan from left to right to follow assorted patterns with manipulatives	4/5 times with 1-2 verbal prompts	1/29/02 4/11/02 6/12/02 10/15/02			

INTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL EDI

INDIVID ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy

Approved Copy

Service Provider: *physical therapist/ special education instructional team*

Student:

Area: *Gross Motor*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will safely and independently access all aspects of his educational environment	Progress on or mastery of 4/4 short term objectives falls tracking log therapist/teacher consult	11/6/00 1/23/01 3/26/01 6/12/01			
Short-Term Objectives/Benchmarks The student will:					
1. consistently and spontaneously use an alternating foot pattern with or without the handrail while going up and down the stairs with his classmates	100% close adult supervision across data collectors	11/6/00 1/23/01 3/26/01 6/12/01			
2. be able to walk along the 5" balance board (low to the floor) using a true tandem (positive step length) gait pattern	100% close adult supervision across data collectors	11/6/00 1/23/01 3/26/01 6/12/01			
3. be able to go up and down the bus steps using either a marking time pattern or alternating feet with one hand on the rail	100% close adult supervision across data collectors	11/6/00 1/23/01 3/26/01 6/12/01			
4. maintain proper postural alignment in sitting	at least 5 minutes with 90% accurach across data collectors	11/6/00 1/23/01 3/26/01 6/12/01			

NTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL EDI'

INDIVID ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy Approved Copy

Service Provider: *APE teacher and Staff*

Student:

Area: *Adapted PE*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
will demonstrate skills targeting movement activities as outlined in the CCPS Essential Elements Curriculum	progress on or mastery of 7/7 short term objectives	1/29/02			
		4/11/02			
	data collection	6/12/02			
		10/15/02			
Short-Term Objectives/Benchmarks The student will:					
1. run/walk a distance of 3 laps in the gymnasium maintaining a continuous run for at least 15 feet	60% of the distance	1/29/02			
	with verbal cues and	4/11/02			
	physical prompts	6/12/02			
	across data collectors	10/15/02			
2. jump off both feet a minimum of 2 inches: A. with verbal cues and physical support B. independently	5/5 trials	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
3. demonstrate throwing with a dominant hand 5 times while rotating the hip and shoulders during the pre-throw pattern	3/5 throws	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
4. demonstrate catching an underhand tossed ball 5 times while maintaining an extension of the arms and hands in preparation of the catch	60% of attempts	1/29/02			
		4/11/02			
	teacher observation and	6/12/02			
	documentation	10/15/02			

NTY PUBLIC SCHOOLS

DEPARTMENT OF SPECIAL EDI'

INDIVID. ZED EDUCATION PROGRAM (IEP)
Section IV: ANNUAL GOAL AND SHORT-TERM OBJECTIVES/BENCHMARKS

Date of IEP Meeting: *10/15/01*

☒ Proposed Copy Approved Copy

Service Provider: *APE teacher and Staff*

Student:

Area: *Adapted PE*

EACH MARKING PERIOD PARENTS WILL BE NOTIFIED IN WRITING CONCERNING PROGRESS ON ANNUAL IEP GOALS.
(See Attached Goal Criteria Addendum)

GOAL:	Procedure and Criteria for Completion	Scheduled Review Date	Date Reviewed	Result of Evaluation	Comments
continued					
Short-Term Objectives/Benchmarks The student will:					
5. walk on toes a distance of 15 feet A. with verbal cues and physical support B. independently	80% of distance of 15 feet	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
6. slide/side-step to the right a distance of 15 feet A. with verbal cues and physical support B. independently	60% of distance of 15 feet	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			
7. slide side-step to the left a distance of 15 feet A. with verbal cues and physical support B. independently	60% of distance of 15 feet	1/29/02			
		4/11/02			
		6/12/02			
	across data collectors	10/15/02			

COU UBLIC SCHOOLS DEPARTMENT OF SPECIAL EDU

INDIVIDUALIZ EDUCATION PROGRAM (IEP)

Date: 10|15|01

Name: ____________________

☑ Alternative Assessment (Example: IMAP) ☑ Proposed Copy ☐ Approved Copy

ACCOMMODATING, EXCUSING, AND EXEMPTING STUDENTS IN MARYLAND ASSESSMENT PROGRAMS

The following MSDE-approved assessment modifications are to be made in this student's ***instructional program***, Maryland Functional Tests, Maryland School Performance. Assessments, Norm Referenced Testing, and/or the High School Assessments (exemptions must be justified in the IEP Committee Report):

Test	I. Scheduling				II. Setting				III. Equipment				IV. Presentation				V. Response				Status to Date on - MFT's & HSA's	
	MFT	MSPAP	NRT	HSA	MFT	MSPAP	NRT	HSA	MFT	MSPAP	NRT	HSA	MFT	MSPAP	NRT	HSA	MFT	MSPAP	NRT	HSA	MFT	
Reading (MFT/MSPAP/NRT)				■				■				■				■				■		■
Math (MFT/MSPAP/NRT)				■				■				■				■				■		■
Writing (MFT/MSPAP/NRT)												■				■				■		■
Citizenship (MFT)		■	■	■		■	■	■		■	■	■		■	■	■		■	■	■		■
Language Arts (MSPAP/NRT)	■			■	■			■	■			■	■			■	■			■	■	■
Science (MSPAP/NRT)	■			■	■			■	■			■	■			■	■			■	■	■
Social Studies (MSPAP/NRT)	■			■	■			■	■			■	■			■	■			■	■	
English (HSA)	■	■	■		■	■	■		■	■	■		■	■	■		■				■	
Math (HSA)	■	■	■		■	■	■		■	■	■		■	■	■		■	■	■		■	
Science (HSA)	■	■	■		■	■	■		■	■	■		■	■	■		■	■	■		■	
Social Studies (HSA)	■	■	■		■	■	■		■	■	■		■	■	■		■	■	■		■	
Other (General Instructions)																					■	
																					■	
																					■	

3-part W- Student File Y- Parent P - Teacher Ref: VI: IEP Committee Procedures Page ___ of ___ pages SE170a (1/00)

COUNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL EDUCATION

INDIVIDUALIZED EDUCATION PROGRAM (IEP)		Student:	
Date of IEP:	10/15/01	[x] Proposed Copy	[ ] Approved Copy

SECTION V. LEAST RESTRICTIVE ENVIRONMENT (LRE) AND SUMMARY OF SERVICES

What modifications, including supplementary aids and services are required to facilitate participation in the educational program?

Modified curriculum Sensory diet throughout the day
Small student teacher ratio
1:1 instruction and assistance as needed
Picture symbols/picture schedules
Limit distractions in the environment as appropriate
Modified seating as appropriate
Assistive technology as needed to access instruction – adapted keyboard, rubber stamps

Areas	Instructional Services to be Provided/Provider	Hrs/Week	Environment Code(s)	Dates of Initiation (implementation and Anticipated Duration			
				M/D/Y	M/D/Y	M/D/Y	M/D/Y
Functional life Skills	special education instructional team	20.5	D/B	10/15/01	6/12/002	8/26/02	10/15/02
Math	Special education instructional team	↑	D	10/15/01	6/12/002	8/26/02	10/15/02
ading	special education instructional team	↕	D	10/15/01	6/12/002	8/26/02	10/15/02
ocial – Personal Mgt.	special education instructional team	↓	D/B	10/15/01	6/12/002	8/26/02	10/15/02
Adapted PE	PE instructional team	.5	D/B	10/15/01	6/12/002	8/26/02	10/15/02
Lunch recess art music PE	Regular education setting with support	8	B	10/15/01	6/12/002	8/26/02	10/15/02
[illegible] Related Services (including transportation) to be provided [illegible]							
	Physical therapy	consult	C	10/15/01	6/12/002	8/26/02	10/15/02
	Speech/language therapy	2	C	10/15/01	6/12/002	8/26/02	10/15/02
	Occupational therapy	1.5	C	10/15/01	6/12/002	8/26/02	10/15/02
	Special transportation	5		10/15/01	6/12/002	8/26/02	10/15/02
Total Hours/Week of Special Education 37.5 and Related Services				Percent of Time in Regular Education 24%			

ENVIRONMENT DES:	A – Regular Education with supplementary aids and Services B – Regular Education with supplementary aids and Services C – Itinerant services	D - Separate class in regular school E - Separate school – public F - Separate school - private

Any code other than A-C requires written justification in "Additional Comments" section of the "IEP Committee Meeting Report."

3 Part W - Student File Y - Parent P - Teacher Re: VI: IEP Committee Procedures Page 8 of pages 31 SE170 (10/99)

COUNTY PUBLIC SCHOOLS DEPARTMENT OF SPECIAL EDUCATION

INDIVIDUALIZED EDUCATION PROGRAM (IEP) Date of IEP: 10/15/01

Student: ______________________ X☐ Proposed Copy ☐ Approved Copy

PARENT INFORMATION / CERTIFICATION (Please check the items and sign below)

☐ I understand and consent to the transmission of information to the Maryland State Department of Education. This information will be used for accounting purposes as well as monitoring and evaluation activities.

☐ I have a AProcedural Safeguards - Parental Rights booklet and my rights have been explained to me and my questions answered. Extended School Year (ESY) Services were discussed.

☐ If my child is at least in third grade (or above) or is at least 9 years old (or older), the requirements for a Maryland high school diploma have been explained to me along with my child=s progress in meeting these requirements.

☐ I choose to accept Service Coordination for Children with Disabilities Case Management. I understand that the purpose of this service is to assist in gaining access to needed medical, social, educational, and other services. I understand that this service does not restrict or otherwise affect my child=s eligibility for other Medical Assistance benefits. At this time, I agree with case manager(s) recommended by the school system. I understand that if I wish to change the case manager(s) in the future, I can call the school system to make the change.

My child ☐ is ☐ is not medical eligible.
If my child is eligible, his/her MA# is ______________

I give my consent for service coordination to be provided by: ________ ________ Facilitator ________ Case Manager

________________ Parent Signature ________________ Date

Signature / position of IEP team members who participated in IEP development / review:	Initials / Date indicating IEP approval: Initial	Date of Approval
Administrator / designee ________	________	10/15/01
Special Educator ________	________	10-15-01
Parent / Guardian ________	________	________
Student ________	________	________
Other (specify) ________ Position ________	________	10/15/01
Other (specify) ________ Position ________	________	10/15/01 10-15-01
Other (specify) ________ Position ________	________	10/15/01
Other (specify) ________ Position ________	________	10/15/01
Other (specify) ________ Position. ________	________	10/15/01

10/15/01

10/15/01

10/15/01

10/15/01

e. determined not to sign the IEP that she participated, or
tial indicating approval of the proposed IEP.

(11)

Supreme Court, U.S.
FILED
JUN 24 2005
OFFICE OF THE CLERK

No. 04-698

In The
Supreme Court of the United States

◆

BRIAN SCHAFFER, a minor, by his parents and
next friends, JOCELYN and MARTIN SCHAFFER, et al.,

Petitioners,

v.

JERRY WEAST, Superintendent of Montgomery County
Public Schools, and the BOARD OF EDUCATION
OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

◆

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALASKA, AND OKLAHOMA, AND THE TERRITORY OF GUAM IN SUPPORT OF RESPONDENTS

◆

MARK J. BENNETT
Attorney General
STATE OF HAWAII

GIRARD D. LAU*
Deputy Attorney General
STATE OF HAWAII
**Counsel of Record*

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus Curiae State of Hawaii

[Other Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

DAVID W. MARQUEZ
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-2133

W.A. DREW EDMONDSON
Attorney General of Oklahoma
2300 N. Lincoln Boulevard,
Suite 112
Oklahoma City, Oklahoma
73105-4894
(405) 521-3921

DOUGLAS B. MOYLAN
Attorney General of Guam
287 West O'Brien Drive
Hagatna, Guam 96910
(671) 475-3324

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INTERESTS OF THE AMICI CURIAE

The amici States have vital interests – fiscal, moral, and legal – in upholding the Fourth Circuit's ruling that where the parents initiate the IDEA hearing to challenge the school system's Individualized Education Program (IEP), the burden of proof should be on the parents.

First, and quite obviously, placing the burden upon the school system, rather than the parents, makes it more difficult to defeat unreasonable demands of parents seeking to abuse the system, needlessly increasing the costs to the states of educating disabled children. In this case, for example, there was evidence that the parents would likely have refused *any public* school IEP because of their predetermined decision to send their child to *private* school, and simply have the state pay for that private education. In addition, placing the burden upon the school system will only encourage parents to make borderline or unreasonable demands, increasing *legal* expenses, too, for states and localities fighting such challenges. The average state has over 130,000 children being served by the IDEA, and thus the fiscal impact to the amici States of an adverse ruling in this case could be substantial.

Most significantly, putting the burden of proof upon the school systems would force them to divert scarce resources to satisfy (or litigate against) borderline or unreasonable claims. This would have the terrible consequence of leaving the states and their school systems with less money to meet the

reasonable needs of truly deserving disabled children.[1]

Any state or school district that wishes to err on the side of supporting parents' preferences – over the school district's contrary assessment – regarding the education of their disabled child is always free to do so *voluntarily*. Any such state can voluntarily craft an IEP that is generous to the parents, or, by state law, impose the burden upon the school district. Therefore, *no* state is benefited by a Supreme Court interpretation mandating a tipping of the balance that forces *all states'* school districts to bear the burden of proof in all cases, which could prove costly when parents make borderline or unreasonable demands. There is thus no meaningful benefit to *any* state of a Supreme Court ruling forcing all states to assume the burden, but only a costly downside, as already explained above. The amici States, therefore, find it quite surprising that Virginia (joined by 8 other states) has filed a brief in support of reversal. If those states wish to have the burden upon the school system, they can choose to *voluntarily*

---

[1] In addition, a Supreme Court decision placing the burden of proof on the school system would signal a dangerous shift away from the traditional rule that parties bringing challenges bear the burden of proof on their claims, and could thus make it more likely that in *other* contexts – involving laws that are silent as to which party bears the burden of proof – the burden will be shifted to the governmental defendant. Indeed, the Virginia amicus brief appears to support the astonishing position by petitioners that placing the burden of proof on the complaining party in administrative proceedings under IDEA violates due process. *See* Pet. Br. 26; Virginia Amicus Br. 11. That argument is flatly contradicted by this Court's decision in *Lavine v. Milne*, 424 U.S. 577, 585 (1976). But if it were adopted it could dramatically alter numerous administrative proceedings at the state and local level and impose added burdens on government.

assume that burden by *state* law,[2] or they can simply have the school systems craft IEPs responsive to the parents' wishes. The amici States joining this brief believe that putting the burden of proof upon the parents who are challenging the IEP represents the best interests of the states, as well as the best educational interests of disabled children, and that there is no basis for construing the IDEA as imposing a federal burden of proof on school districts in *all* cases.

◆

SUMMARY OF THE ARGUMENT

Despite expressly providing many procedural benefits to parents in the IDEA, Congress did not specifically define the allocation of the burden of proof. This silence combined with a respect for federalism that leaves local matters to the states unless doing so is contrary to the express terms or aims of the IDEA mean that Congress, at the very least, left the allocation of the burden of proof to the policy judgment of each individual state. Moreover, Congress expressly stated that it is the role of the *state or local educational agency* to "establish and maintain *procedures* in accordance with this section to ensure that children with disabilities . . . are guaranteed procedural safeguards." Allocation of the burden of proof to the parents (or to the school system) is surely such a procedure, is not inconsistent with the section's silence on the matter, and does not deny nor undermine dozens of other IDEA-specified "procedural safeguards."

---

[2] Indeed, the Virginia amicus brief acknowledges this in its alternative argument claiming that states may voluntarily shift the burden to the school districts if the IDEA does not by itself mandate that result. Virginia Amicus Brief at 14-17. It is therefore all the more surprising that Virginia would take the position that Congress silently imposed an extraordinary burden of proof on state and local educators in IDEA hearings.

If this Court, however, believes the IDEA specifies a particular allocation of the burden of proof *uniformly across all states*, as explained below, that burden must rest upon the parents (subject to each state's choice to *voluntarily* assume or place the burden upon the school system as a matter of state law, the IDEA simply setting a minimum federal floor). There is no basis for interpreting the IDEA as establishing a uniform federal rule that school districts *always* bear the burden of proof in IDEA hearings, even when they are initiated by parents.

Because the IDEA is Spending Clause legislation, Congress may not impose any obligation upon the States unless it does so *unambiguously*. The IDEA's utter silence on the burden of proof establishes beyond all doubt that Congress has not *unambiguously* placed the burden of proof upon the states or their school systems. Moreover, the fact that at least four United States Courts of Appeals have concluded that the IDEA does not impose the burden of proof upon the school systems (without relying upon this Spending Clause theory) further belies any claim the IDEA *unambiguously* places the burden upon the school system.

In addition, the traditional rule is that the burden is on the party bringing the action. This Court has followed this principle as to numerous federal civil rights statutes, uniformly making the plaintiffs bear the burden of proof, even though they are the parties the civil rights statutes are designed to protect.

But the case for following the traditional rule is overwhelming in this case because the school system proposing the IEP is a *government* agency, and this Court has always *presumed* that government officials carry out their duties in compliance with their legal obligations. Thus, the school-system-proposed IEP is presumed to fulfill the IDEA's requirement that it provide the child a free and appropriate public education (FAPE). Given that presumption, the burden of proof must rest upon the parents attacking the proposed IEP, lest the presumption have no meaning.

This Court has endorsed this presumption of regularity in the IDEA context by insisting that school authorities' judgments implementing the IDEA be given a measure of deference. Moreover, the presumption is especially strong in this case because nothing in the IDEA's findings suggests the states currently have *intentionally* or *purposely* sought to deny disabled children a FAPE. Because Congress instead views the IDEA as a means of *aiding and assisting* the states in a *mutual* desire to educate disabled children, there is no reason to deny the presumption that states act in accordance with their IDEA legal obligations.

Concern for the educational welfare of disabled children further supports placing the burden of proof upon the parents. First, placing the burden upon the parents will *not* lead to deficient IEPs, as in the vast majority of cases, the allocation of the burden of proof will not affect the outcome at all, and in those rarer cases of evidentiary equipoise, the fact that the parents could not meet their burden of showing the IEP to be deficient suggests, quite obviously, that the IEP is adequate. Second, civil rights plaintiffs bear the burden of proof even if that could, on occasion, mean a victimized plaintiff goes uncompensated, and they bear this burden even though the private defendants, unlike the school authorities in the IDEA context, are not presumed to act lawfully. Third, petitioners' claim that placing the burden upon the parents hinders IDEA goals cannot be distinguished from a theory that *all* procedural matters must be resolved in favor of the parents; a theory that would make superfluous the IDEA's express provision of various procedural protections for the parents.

Fourth, and most importantly, placing the burden of proof upon the parents actually *promotes* the IDEA's goal of educating disabled children. Given the finite resources available for assisting the education of disabled children, shifting the burden to the school system would mean that states would have to waste precious resources upon questionable programs and services, thereby lessening the funds available to best assist the real needs of disabled children. And because it may cost more to litigate than to concede, the school system may sometimes have to agree to unreasonable or abusive parental demands, further squandering limited resources. Finally, funds will also be depleted because shifting the burden to the schools would encourage *more* parents to demand questionable services, and thus increase the *number* of borderline claims. In short, placing the burden of proof upon the schools simply diverts resources from the genuine needs of disabled children towards parents with doubtful, and often abusive, demands.

Concerns for fairness and relative access to information and expertise do *not* support placing the burden upon the school system. First, the IDEA ensures that relevant information in the possession of the school system is shared with the parents. Second, the IDEA gives parents

the right to obtain disability experts, and legal counsel who may be IDEA specialists, to assist them, and, if they prevail, attorney fees and costs to pay for these experts. Third, parents have access to critical information – including how their child learns, reacts, and adapts, in a multitude of *non-school* settings, and how their child has responded to educational instruction and special assistance in *private* schools – not directly available to the public school authorities.

Finally, even if parents did have less access to information and expertise, civil rights plaintiffs, too, have less access to relevant information and expertise than do their employer defendants; nevertheless, this Court places the burden of proof upon the plaintiffs. Furthermore, if the school really did have greater expertise and information access, the school's proposed IEP should be entitled to *more* deference, not less; placing the burden of proof upon the parents respects that deference.

◆

ARGUMENT

The IDEA's especially strong reinforcement of the presumption of regularity, its principle goal of ensuring an appropriate education for *all* disabled children, and a basic respect for federalism and fairness concerns, dictate that placement of the burden of proof in IDEA administrative hearings should, at minimum, be left to the discretion of each state, or be placed upon the parents seeking to challenge the school system's proposed IEP, unless the school system *voluntarily* chooses to assume that burden. The Court should reject petitioners' argument that the

IDEA silently imposes a federal burden of proof on school systems in all cases.

I. The Silence of the IDEA on Allocation of the Burden of Proof, its specific Delegation of IDEA Procedural matters to the School Systems, and a respect for Federalism, command that the Burden of Proof at minimum be left to each State's Discretion.

If Congress had intended to place the burden of proof upon the school system, it could easily have done so by expressly dictating that result. However, despite imposing numerous requirements upon school systems, and providing all sorts of procedural benefits to the parents of disabled children,[3] Congress did not direct that school systems bear the burden of proof. At the very least, therefore, Congress has left it to the states or their school systems to decide upon whom the burden of proof should rest. To conclude that Congress has, in blanket fashion, imposed the burden upon every school system in the nation is to fabricate a mandate out of congressional silence.

Worse, it would show utter disregard for our federal system, which leaves fundamentally local matters – including, of course, the education of a localities' disabled children – to the province of the local authorities provided their decisions do not violate the terms or goals of a congressional statute (that Congress has the authority to enact). *See Wisconsin Dep't of Health and Family Services v. Blumer*, 534 U.S. 473, 495 (2002) ("When interpreting . . . statutes [designed to advance cooperative federalism[4]], we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims."[5]); *Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("[I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down [and instead] leav[e] 'the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance.'"). Instead, by dictating only that the hearing officer make a decision "on substantive grounds based on a determination of whether the child received a free appropriate public education," 20 U.S.C. § 1415(f)(3)(E)(1), without specifying which side has the burden of proof as to that decision, Congress has at the very least left the issue of burden of proof to the states.[6]

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[3] To name just a few of the procedural requirements, the IDEA requires school systems to disclose in advance to the parents all evaluations completed to date, and recommendations based upon those evaluations, that the school district intends to use at the hearing. 20 U.S.C. § 1415(f)(2)(A). It assures parents at the hearing the right to be accompanied and advised by counsel and experts, the right to confront and cross-examine witnesses, and many other procedural rights. 20 U.S.C. § 1415(h).

[4] "Cooperative federalism" is where "the Federal Government provides financial assistance to participating States to aid them in furnishing" a particular service, *Harris v. McRae*, 448 U.S. 297, 308 (1980), which is "administered by the States." *King v. Smith*, 392 U.S. 309, 316 (1968). The IDEA is thus a paradigm example of cooperative federalism.

[5] *See* footnote 8, infra.

[6] Indeed, as explained in Section II, infra, the federalism concerns are especially strong in the Spending Clause context and actually prohibit this Court from imposing the burden upon a state or its school system without its consent.

Indeed, Congress' only express statutory statement on the matter conclusively validates the view that the states or their school systems have the authority to decide upon which party to place the burden of proof. For 20 U.S.C. § 1415(a) states as follows:

> (a) Establishment of procedures.
>
> *Any State educational agency, State agency, or local educational agency . . . shall establish and maintain* ***procedures*** in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

Congress has thus explicitly stated that it is up to the school system to determine all *procedural* matters. Given that § 1415(a) refers to the broad scope of procedures set forth in § 1415, which include the due process hearing specified in subsection (f), the issue of who bears the burden of proof at such a due process hearing is a "procedural" matter. Nothing could be clearer.

Congress did not narrow the school system's authority to select whatever procedures it wanted except to insist that the procedures be "in accordance with this section," and "ensure that children . . . and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education." *Id.* Assigning the burden of proof to the parents would obviously *not* violate the "in accordance with this section" mandate, as the section is silent on the matter. Nor would such an assignment deny children and their parents "procedural safeguards." The IDEA spells out numerous procedural safeguards Congress believed necessary to protect the interests of the parents and their child, but making school systems shoulder the burden of proof was not one of them. Nor can it be said that a party, by the mere fact that it bears the burden of proof, has been denied procedural safeguards, any more than one could say a plaintiff in a typical civil proceeding is denied procedural safeguards by having to bear the burden of proof.[7] Therefore, as long as the school systems devise procedures that meet all the explicit procedural requirements of the IDEA, Congress has, at the very least, left other procedural issues, including the burden of proof, to the states.[8]

Although the burden of proof, consequently, is at minimum a matter for each state to decide on its own, if this Court feels compelled to conclude that the IDEA itself imposes a uniform burden of proof across all states and localities, as explained in detail below, that burden must be placed upon the *parents* challenging a proposed IEP. (Of course, a state or locality could still *voluntarily* choose to assume the burden of proof, as the IDEA simply sets a minimum federal floor.[9]).

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[7] It would be improper to conclude that any procedural rule *beneficial* to the parents is required by this language, absent language expressly, or even implicitly, suggesting that rule. Otherwise, school systems would have to devise procedures that were overwhelmingly one-sided, not only placing the burden on the school, but also having that burden employ a clear and convincing (or beyond a reasonable doubt) standard, and fashioning *every* procedure in favor of the parents. This could not have been Congress' intent.

[8] And, as Respondents note in their brief, they and we are unaware of the Secretary of Education disapproving a state's IDEA "policies and procedures," 20 U.S.C. § 1412(a), as failing to "afford[ ] the procedural safeguards required by section 1415 of this title," § 1412(a)(6)(A), because that state placed the burden on the parents. Contrary to Petitioners' assertion that no states by statute or regulation have placed the burden of proof upon parents, Pet. Br. at 19, at least two states have done so – *see, e.g.*, 511 Indiana Administrative Code 7-30-3(p) & (r), referencing Indiana Code 4-21.5-3-14; 707 Kentucky Administrative Regulations 1:340 Section 7(4), incorporating Kentucky Revised Statutes 13B.090(7) (both states placing the burden of proof upon the party requesting agency action or seeking the benefit, which is usually the parents) – and other states do so as a matter of practice, as did Maryland in the case at bar.

II. Because the IDEA is Spending Clause legislation, the failure of the IDEA to Unambiguously place the Burden of Proof upon the School System Prohibits this Court from imposing the Burden of Proof upon the States or their School Systems without the States' Consent.

Because the IDEA is Spending Clause legislation, *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 190n.11, 204n.26 (1982), any burdens assumed by the states must be unambiguously expressed.

> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' . . . Accordingly, *if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.*"

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[9] *Cf., e.g., Blackmon v. Springfield R-XII School Dist.*, 198 F.3d 648, 658-59 (8th Cir. 1999) ("Several courts . . . have determined that higher *state* educational standards are applicable to a student's IDEA claim brought in that state."); Virginia Amicus Brief at 14-17.

Rowley, 458 U.S. at 190 n.11, 204 n.26 (quoting *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981)). Here, given the unmitigated silence of the IDEA regarding burden of proof (except for certain aspects discussed below that, if anything, suggest strongly the burden should be on the *parents* objecting to an IEP), the IDEA plainly does *not unambiguously* place the burden of proof upon the school district. Indeed, the fact that at least four United States Circuit Courts of Appeals, after studying the IDEA, have concluded that the IDEA does not impose the burden of proof upon the school districts (and they did so without relying upon this Spending Clause ambiguity theory),[10] is further proof that the IDEA does not *unambiguously* place the burden upon the school districts. Accordingly, the Spending Clause ambiguity rule set forth in *Rowley* and *Pennhurst* conclusively dictates affirmance of the Fourth Circuit's decision.

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[10] *See Weast v. Schaffer*, 377 F.3d 449, 452-56 (**4th Cir.** 2004); *Alamo Heights Indep. School Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986) (relying upon *Tatro v. Texas*, 703 F.2d 823, 830 (**5th Cir.** 1983), *aff'd in part and rev'd in part sub nom. Irving Indep. School Dist. v. Tatro*, 468 U.S. 883 (1984)); *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (**6th Cir.** 1993) (citing to *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990), which in turn cites to *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990), which in turn cites to *Tatro*, supra); *Johnson v. Indep. School Dist. No. 4*, 921 F.2d 1022, 1026 (**10th Cir.** 1990) (citing to *Alamo*, supra).

III. Traditional Practice, and the Especially Strong Presumption under the IDEA that School Authorities have Properly Discharged their Legal Duties, require that the Burden of Proof be placed upon the Parents Challenging the School System's proposed IEP.

The traditional rule is that, absent express language to the contrary, the burden is on the party bringing the action, which in this case are the parents requesting the IDEA administrative hearing to challenge the IEP.[11] *See Jones on Evidence* (Clifford S. Fishman, 7th Ed. 1992) Section 3:12 at pp. 239, 242 ("Typically, the plaintiff has the burden of pleading and proving every essential fact and element of his cause of action. . . . " "[T]he burdens of production and persuasion generally fall . . . upon the party that asserts the claim."); *cf.* 5 U.S.C. § 556(d) (in federal administrative hearings, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). This Court has followed this traditional rule *as a matter of course* under numerous federal civil rights statutes, by imposing the burden of proof upon the plaintiff, even though the plaintiff is the party the statute is designed to protect. *See, e.g., Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 806 (1999) (ruling, without discussion, that burden of proving one is a qualified individual with a disability under the Americans with Disabilities Act is upon the plaintiff); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the

plaintiff [under Title VII] remains at all times with the plaintiff."), *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973) (ruling, without citing precedent or providing rationale, that plaintiff in Title VII claim against governmental employer has initial burden, and that ultimate burden to show employer's rationale for adverse employment decision is pretextual is also upon plaintiff).

Indeed, the IDEA itself suggests application of the traditional rule is appropriate by requiring IDEA hearing officers "to conduct hearings" and "render and write decisions" "in accordance with . . . *standard legal practice*," 20 U.S.C. § 1415(f)(3)(A)(iii) & (iv), which would presumably include applying traditional practice with respect to burdens of proof.

The case for following this traditional rule is especially strong under the IDEA because the school system party, which proposes the IEP, is a *government agency*, and this Court has always *presumed* that government officials fulfill their legal duties by acting in accordance with the law. *See United States Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."). Thus, the school system proposing the IEP (over the objections of the parents) is presumed to have designed the IEP to comply with the IDEA's requirement that it provide the child a free and appropriate public education. Given that presumption, the burden of proof must be on the parents claiming the school system has *not* complied with its IDEA duties in fashioning the IEP. To put the burden of proof upon the school system would render the presumption of regularity entirely without meaning. If no party puts on any evidence, then the presumption is necessarily unrebutted, and the school system must prevail; but the school system would not prevail under that scenario if the burden of proof were upon the school system. In sum, the presumption that the school system fulfilled its IDEA duties requires the burden of proof to rest upon the parents challenging the school system's IEP. *See Sunday Lake Iron Co. v. Wakefield TP.*, 247 U.S. 350, 353 (1918) ("The good faith of such [state] officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.").

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[11] The parents challenging the IEP must "present a complaint . . . which sets forth an alleged violation." 20 U.S.C. § 1415(b)(6)(B).

In sum, because the traditional rule of placing the burden upon the challenger applies even in contexts not involving any presumption of regularity, as it does under the civil rights statutes discussed earlier (where the employer is often a private *non-governmental* entity), *see McDonnell Douglas, Cleveland*, supra, *a fortiori*, it certainly must apply under the IDEA, where the school system is a governmental agency whose IEP proposals are presumed to be in accordance with the IDEA.

Moreover, this Court has endorsed the presumption of regularity of school authorities' actions *under the IDEA* by insisting that school authorities' judgments implementing the IDEA should be given a measure of deference. *See Bd. of Educ. v. Rowley*, 458 U.S. at 206 (courts must not "substitute their own notions of sound educational policy for those of the school authorities which they review.").

Furthermore, the findings and purposes articulated by Congress in the IDEA provide further reason to apply the presumption of regularity. For despite laying out numerous findings justifying the law, Congress makes no finding suggesting that states or school authorities currently are *intentionally* or *purposely* seeking to deny disabled children a FAPE. *See* 20 U.S.C. § 1400(c) (setting forth 14 findings, none of which suggest the states have *deliberately* tried to avoid properly providing for the education of disabled children). Moreover, in the 2004 amendments, Congress found that, in implementing the IDEA, states and school authorities have been successful in "ensuring children with disabilities and the families of such children access to [FAPE] and in improving educational results for children with disabilities." 20 U.S.C. § 1400(c)(3). With absolutely no suggestion – or evidence – of willful resistance by state and local educators, there is no reason to deny the presumption that school authorities fulfill their IDEA obligations in proposing IEPs. Indeed, Congress has viewed the IDEA *not* as a stick to force unwilling states to assist disabled children, but as a means of *aiding and assisting* the states in a *mutual* desire to educate disabled children. 20 U.S.C. § 1400(d)(1)(C) (major purpose of IDEA is to "*assist States, [and] localities* . . . to provide for the education of all children with disabilities."). The presumption of regularity, therefore, should be especially robust under the IDEA.

In sum, the usual presumption of regularity given to *any* governmental agency action is so much stronger in the IDEA context in particular that the burden of proof, if it must be placed upon one party uniformly across the country, must rest upon the parents seeking to overturn the judgment of the school system.[12]

IV. Concern for the Educational Welfare of Disabled Children Not Only Does Not Support Shifting the Burden of Proof to the School System, but Actually Strongly Supports placing the Burden of Proof upon the Parents.

Much of Petitioners' brief rests upon the basic policy argument that the burden of proof must fall upon the school system because the IDEA's overriding objective is to ensure disabled children access to a meaningful education. This argument is specious for numerous reasons. First, it wrongly presumes that placing the burden of proof upon the parents will lead to an IEP that does not meet the needs of the children. In fact, if the school system devises an IEP and the parents are not able to meet their burden of proof to show that it does not provide a free appropriate public education (FAPE), then there is no reason to believe that the IEP does not provide the child with the required FAPE. Indeed, petitioners themselves acknowledge that the burden of proof in most cases will *not* affect the outcome, except in those cases where the evidence is in equipoise. Pet. Br. at 25.

And in those minority of cases of equipoise, there is no reason to believe that a result in favor of the school system would ever deny a FAPE to the child. After all, because the evidence is in equipoise, the school's IEP could not be demonstrated to be inadequate. Petitioners are thus flat wrong in claiming that in the equipoise situation, there is a 50% chance that the hearing officer's decision upholding the IEP is a "mistake," and that the school system's program is a failure. The hearing officer's upholding the school's IEP in *all* equipoise cases can *never* be a "mistake," but is simply the correct application of the burden of proof to the evidence presented. The 50% claim is even more baseless given the presumption of regularity – discussed in detail in the previous section – that school officials under the IDEA are presumed to act in compliance with their legal obligations under that law.

For similar reasons, petitioners are wrong to suggest that there is a 50% chance of the approved IEP in an equipoise situation failing to adequately educate the child; all that can be said is that there is a 100% certainty that the parents have failed to demonstrate by a preponderance of the evidence that the school's IEP is unsatisfactory. But even if one accepted petitioners' erroneous claim of a 50% chance of failure, the inadequacy of the IEP would be *de minimis* by definition, given the evidentiary equipoise. In sum, the IDEA's overriding objective of ensuring disabled children access to a meaningful education is not at all undercut by placing the burden of proof upon the parents.

Second, even if, contrary to the above, placing the burden of proof upon the parents *did* mean an occasional deficient IEP would stay in place, that would not mean that the burden of proof should be shifted to the school. After all, civil rights plaintiffs bear the burden of proof, even if that burden could on occasion mean a victimized plaintiff goes uncompensated, and even though the overriding goal of the civil rights laws is to protect the plaintiffs. And that holds true even though the private

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[12] Of course, as noted earlier, supra at footnote 9 and accompanying text, each individual state could *voluntarily* place the burden upon its school system(s), as the IDEA simply sets a minimum federal floor.

employer civil rights defendant, unlike the IDEA school authority, is *not* presumed to act within the law.

Third, petitioners' argument cannot be distinguished from a theory that *any* procedural advantage for the school system is a threat to the IDEA's ultimate goal. To accept such an argument is to demand that every matter that is not spelled out in explicit statutory language to the contrary be interpreted in favor of the parents. This cannot be the case as Congress chose to spell out in detail numerous procedural benefits for the parents, which would have been a completely superfluous exercise if plaintiffs' theory held true. Such a demand would also violate the Spending Clause ambiguity rule discussed in Section II, supra.

Fourth, and perhaps most importantly, placing the burden of proof upon the parents challenging an IEP actually *furthers* the IDEA's goal of educating disabled children. It cannot be forgotten that the resources available to educate disabled children are finite and limited. Placing the burden of proof upon the school authorities will mean that states will sometimes have to expend precious resources on *questionable* programs and services, thereby hurting the states' fiscal ability to provide for the *genuine* educational needs of disabled children. Moreover, because *litigating* cases also costs states money, placing the burden upon the school system may cause many school systems to give in to even *wholly unreasonable demands* simply because it would cost more to fight the case than to concede. In addition, even if the school system does *not* concede, and ultimately prevails, it will have to bear the *litigation costs*, as unlike parents, the school authorities do not receive compensation for attorneys' fees (unless the parents' demands were frivolous or brought for an improper purpose). 20 U.S.C. § 1415(i)(3)(B)(i)(II) & (III).

Moreover, placing the burden of proof upon the school system will only *encourage* parents to make unreasonable demands, thereby increasing the *number* of borderline or downright unreasonable claims. This, of course, will only further deplete valuable resources as the school systems either give in to (thereby expending money on unnecessary services), or fight (thereby expending money on litigation expenses) those demands. **Either way, given the reality of limited resources, placing the burden of proof upon the school systems will have the ultimate effect of shifting services away from fulfilling the real needs of disabled children and towards parents with questionable, and sometimes abusive, demands.**

Therefore, any desire to promote "justice," to be "compassionate," or to best serve the interests of disabled children in general, in fact calls for placing the burden of proof upon the parents, not the school system. Indeed, the Administrative Law Judge in this very case concluded "there was a design by the parents to simply obtain funding from MCPS for a predetermined decision to have the Child attend *private* school." *Weast v. Schaffer*, 240 F.Supp.2d 396, 401 (D. Md. 2002), *rev'd on other grounds*, 377 F.3d 449 (4th Cir. 2004). Thus, "justice" is often served by rejecting parents' borderline or questionable demands.

In any event, petitioners' attempt to portray the matter as one of erring on the side of disabled children – *see* petitioners' flawed balancing of the *Mathews v. Eldridge* factors, Pet. Br. at 24-26 – erroneously assumes that ruling in favor of the parents in close cases can only help disabled children, when, in fact, it simply diverts resources away from undeniably deserving children to students with more aggressive or demanding parents, and whose demands cannot be substantiated by a preponderance of the evidence.

Finally, petitioners' argument that placing the burden upon the school system promotes accountability is nonsense. Even if the burden of proof rests upon the *parents*, and assuming the parents will put on *some* case,[13] the school system will have to justify its IEP if it hopes to win. Thus, accountability is assured by the IDEA's basic mandate that the school system providing a FAPE; shifting the burden of proof to the school system adds nothing to accountability.

V. Concerns for Fairness and Relative Access to Information and Expertise Also Do Not Support Shifting the Burden of Proof to the School System.

Much of Petitioners' case is rooted in the theory that the school system has greater access to relevant information or expertise and thus is in a better position to bear the burden of proof. This theory is flawed for two principle reasons.

First and foremost, the premise upon which it rests – that the school system has greater access to relevant information and expertise – is simply not true in most, if not all, cases. The IDEA itself ensures that relevant information held by the school system is shared with the parents. *See* 20 U.S.C. § 1415(b)(1) (requiring that the parents be given "[a]n opportunity . . . to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a [FAPE] to such child"); 20 U.S.C. § 1415(f)(2)(A) (requiring school system to disclose in advance to the parents all evaluations completed to date, and recommendations based upon those evaluations, that the school district intends to use at the hearing). The comprehensive information-sharing mandates of the IDEA thus undermine petitioners' theory.

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[13] If the parents cannot or are unwilling to put on some case demonstrating why the proposed IEP is insufficient, they do not deserve to prevail.

The IDEA also ensures that parents have the right to obtain legal counsel and disability experts. *See* 20 U.S.C. § 1415(h)(1) (giving parents at the hearing the right to be accompanied and advised by counsel and child disability experts); 20 U.S.C. § 1415(b)(1) (requiring that the parents be given "[a]n opportunity . . . to obtain an independent educational evaluation of the child"). And because the IDEA provides that prevailing parents may be awarded "reasonable attorneys' fees as part of the costs," 20 U.S.C. § 1415(i)(3)(B)(i)(I), all parents, rich or poor, have a fair chance to obtain qualified counsel and experts. Thus, parents can obtain all the legal and educational expertise they desire, by hiring attorneys *who specialize in IDEA litigation* and who are familiar with the educational needs of disabled children, local school disability education resources that may satisfy those needs, IDEA legal intricacies, and any other relevant matter.[14] There is thus no

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[14] Although it is possible that indigent parents will not be able to obtain such legal representation, that is likely to be the case only where the parents' case is without merit, as a meritorious case will surely attract IDEA legal specialists whose compensation is practically guaranteed by the IDEA fee award provisions.

(Continued on following page)

significant disparity in access to relevant information or expertise.[15]

Moreover, not only do parents have access to key information and expertise available to the school system as explained above, but, conversely, *parents have access to critical information not generally available to the school system*. Chief among the information uniquely within the possession of the parents is how their child responds to and reacts in all sorts of settings and situations *outside* of school. Parents will thus have more complete and comprehensive information as to the extent of a child's disability, how that disability affects the child's ability to do certain tasks or learn various concepts, and the effectiveness of certain aids or accommodations in overcoming that disability.

And even in the unlikely event indigent parents with a meritorious case cannot find qualified counsel, the IDEA assures that they are provided with legal resources to represent their child's interests. *See* 20 U.S.C. § 1415(b)(8) (ensuring that parents have a "model form to assist [them] in filing a complaint and due process complaint notice"); § 1415(c)(1) (providing parents with notice regarding, among other things, "sources for parents to contact to obtain assistance in understanding the provisions of this subchapter"); § 1415(d)(1) & (2) (providing parents a "copy of the procedural safeguards available to the parents of a child with a disability," which include "independent educational evaluation," "access to educational records," "the opportunity to present and resolve complaints, including – [ ] the time period in which to make a complaint," "due process hearings, including requirements for disclosure of evaluation results and recommendations," "State-level appeals," "civil actions," and "attorneys' fees.").

[15] Petitioners claim that some circuits do not allow expert witness fees. But to the extent that is true, that was Congress' judgment (in the view of those particular circuits) to not allow reimbursement for such fees. It cannot be that Congress' purposeful decision to disadvantage parents on one matter requires us to advantage them on any number of other procedural matters, such as the burden of proof.

Furthermore, where the child is in a *private* school setting, as was the case here, the public school system does not even have direct access to information regarding how the child performs *in school*. The parents, on the other hand, will naturally receive reports from the child's private school teachers as to the performance of their child in the school setting, and how the child's learning is impacted by any accommodations or special services that are provided. In short, it is the *parents* who have the superior access to relevant information, not the public school authorities.

Petitioners assert that relative access to information should be judged in the general situation, not the exception. But it is far from clear which case is the exception, as disabled children will often be in private school settings. And even in the public school setting, where the child is having an IEP with special services or accommodations developed for the *first* time (e.g., when the disability is finally recognized by the school), the school may have little or no special knowledge of the child's disability, or how the child will respond to various potential special services. The parents, on the other hand, with their every day experience with the child in all sorts of non-school settings, may have unique knowledge of the extent of their child's disability, its affect upon the child's abilities and learning capacity, and how that child responds to various accommodations or special assistance outside of school.

The second reason petitioners' theory is flawed is that even if, contrary to all of the above, the school system really did have greater access to relevant information and expertise, that still would not warrant shifting the traditional burden of proof from the parents to the school system. Federal law discrimination plaintiffs – under, e.g., Title VII, ADA, ADEA, etc. – have the ultimate burden of persuasion, *see* discussion, supra at 14-15, even though the employer in those cases has better access to the reasons why it did not hire or promote a person, and despite the employer generally having greater resources available to fight such lawsuits. And this is true even though such private employers, unlike school systems under the IDEA, are *not* presumed to act lawfully.

Moreover, if the school system really did have greater expertise and access to information, then its judgment as to the proper IEP should be entitled to *more* deference. Placing the burden of proof upon the parents attacking the school system's judgment respects that deference.

◆

CONCLUSION

For the foregoing reasons, placement of the burden of proof should, at minimum, be left to the discretion of each state, or its school systems. But if the IDEA does prescribe a uniform allocation of the burden of proof, that burden should rest upon the parents challenging the school system's IEP, subject to each state's authority to *voluntarily* place the burden of proof upon its school systems. Because Maryland has not voluntarily assumed on behalf of its school systems the burden of proof in IDEA hearings, the court of appeals correctly held that the parents bore the burden of proof in the IDEA hearing in this case.

Dated: Honolulu, Hawaii, June 24, 2005.

Respectfully submitted,

MARK J. BENNETT
Attorney General
State of Hawaii

GIRARD D. LAU*
Deputy Attorney General
State of Hawaii
**Counsel of Record*

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Amicus Curiae State of Hawaii

[Other Counsel Listed On Inside Cover]

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In The
Supreme Court of the United States

◆

BRIAN SCHAFFER, a minor,
by his parents and next friends,
JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of
Montgomery County Public Schools, *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

◆

REPLY BRIEF OF PETITIONERS

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WILLIAM H. HURD*
SIRAN S. FAULDERS
PAIGE S. FITZGERALD
TROUTMAN SANDERS, LLP
1001 Haxall Point
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)

**Counsel of Record*

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONERS

Five years ago, when the United States was supporting the parents, it aptly described the IDEA as "an important civil rights statute for children with disabilities." U.S. 2000 Amicus Brief at 1. The history of discrimination that gave rise to this landmark legislation was recognized, and the need to hold government accountable was understood. On the burden of proof, the United States convincingly explained that "[a]pplying a presumption of correctness to a draft IEP rejected by the parents . . . would unjustifiably reduce the statute's goal of making the parents meaningful participants in developing the IEP . . . " *Id.* at 11. The United States was right.

Now that the United States is supporting the school district, it says very little about these things.[1] MCPS says even less. Unfortunately, both have lost sight of the IDEA's singular statutory scheme – a unique, equal partnership between parents and the school system. Where there is no consensus, this equal standing logically calls for the burden of proof to be allocated in a way best calculated to advance the fundamental purposes of the IDEA. Thus, concerns about civil rights and parental rights, discrimination and accountability – all of which were well-recognized by the United States five years ago – remain central to this case and provide the key for resolving it.

I. MCPS Misreads the Facts.

MCPS bases much of its case on its unfounded criticism of parents, contending that placing the burden of proof on school districts will prompt parents to be uncooperative in the IEP process. Misreading the record, MCPS suggests that petitioners exemplify such lack of cooperation. According to MCPS, the ALJ found that the Schaffers were "predetermined" to send Brian to a private school, and that their participation in the IEP process was only a "mock effort." Resp. Br. at 33, 35. However, MCPS fails to note that this finding by the ALJ was expressly *reversed* by the district court, which found the Schaffers "cooperated fully" and "in no way prevented the IEP from being formulated or otherwise failed in good faith to consider it." Pet. App. 46-47. Beyond the facts of this case, the unwarranted suspicion of parental involvement – as exhibited by MCPS and its school system *amici* – underscores the need to hold school districts accountable. Placing upon them the burden of proof will promote such accountability.

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[1] Because of its change in sides – and its feeble explanation for switching – the brief of the United States is entitled to no weight or deference. *See Bates v. Dow Agrosciences LLC,* 125 S. Ct. 1788, 1801 (2005) (noting that arguments made by the United States are "particularly dubious" when they contradict a position taken by the United States "just five years ago"). At least in *Bates*, the contradictory interpretations were advanced in different cases. Here, they occur within the same case.

MCPS also tries to explain away its belated decisions to recognize Brian's central auditory processing disorder and offer him placement in a special education learning center. It notes that this placement was in a high school, whereas the dispute over Brian's IEP arose when he was in middle school. Resp. Br. at 10 n.5. Yet, students needing such a placement do not develop those needs only upon reaching high school. The other students at the high school learning center came from somewhere, presumably from a middle school learning center, which respondents never made available to Brian and never discussed with his parents. Thus, MCPS's willingness finally to offer Brian the sort of program his parents had sought from the beginning cannot be credibly explained by his graduation from middle school. A better explanation is the district court's 2000 decision giving MCPS the burden of proof, coupled, perhaps, with a realization by MCPS that it was wrong all along. These facts illustrate the intransigence that school districts may exhibit when they do not bear the burden of proof, and their spirit of cooperation when they do.

II. MCPS Fails to Recognize the Principles That Govern Allocation of the Burden of Proof.

As MCPS concedes, "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see* Resp. Br. at 14. Yet, MCPS fails to recognize the state of the law on the burden of proof at key points in the history of the IDEA. In 1975, when Congress enacted the IDEA's predecessor, this Court already had declared that allocation of the burden of proof is not a matter of "hard-and-fast standards" but is "merely a question of policy and fairness." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 209 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)).[2] In 2004, a few months before Congress re-enacted the IDEA, this Court re-affirmed that there is "no single principle or rule" for allocating the burden of proof. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 494 n.17 (2004) (quoting 9 J. Wigmore, *Evidence* § 2486, at 288 (J. Chadbourn rev. ed. 1981)).

In 2004, the "state of existing law" was to favor placing the burden on school districts. Seven circuits already had reached such a conclusion, *see* Pet. Br. at 18 nn.20 & 21, and the United States had not yet renounced its position agreeing with that result. Most States and most of our Nation's schoolchildren are found within those seven circuits. Only four circuits placed the burden on the parents. Aware of these developments, Congress chose not to settle the circuit split by legislation. Instead, Congress was content to leave the issue to the judicial branch and, *inter alia*, those considerations of "policy and fairness" that this Court said govern the allocation of the burden.

MCPS asks the Court to place the burden on the party who initiates the litigation because Congress did not say otherwise. But this is simply a restatement of the "hard and fast" approach the Court has already rejected. The argument also suffers from an array of other flaws:

1. MCPS says that placing the burden on the party who files the complaint is the "traditional rule." Such simplistic nomenclature yields more smoke than light. As this Court has noted, "'in a case of first impression,' which

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[2] Drawn from a well-recognized treatise, it is this general principle – rather than an exact factual parallel – that makes *Keyes* especially pertinent here. Thus, MCPS's attempt to side-step *Keyes* is unavailing.

we address today, 'reference to which party has pleaded a fact is no help at all.'" *Alaska*, 540 U.S. at 494 n.17 (quoting 2 J. Strong, *McCormick on Evidence* § 337, at 412 (5th ed. 1999)). Moreover, "this so-called 'rule' is, in actuality, merely a presumption and not a very strong one at that." Pet. App. 17 (Luttig, J., dissenting).[3] In any event, the equal standing that the IDEA gives to parents, *see* Pet. Br. at 7, is a very *non*-traditional arrangement, and it makes use of any "traditional rule" inapposite.

2. MCPS also describes the approach it advocates as a "default rule." *See* Resp. Br. at 16, 20. However, a "default rule" is one that does not come into play unless and until all other sources of guidance have been exhausted. In due process hearings, there is no need for a "default rule" because other sources of guidance – including "policy and fairness" – fix the burden on the school district.

3. It is sometimes said that, when the evidence is in equipoise, the judgment should go against the party seeking to change the *status quo*. *See* 2 J. Strong, *McCormick on Evidence* § 337 at 412 (5th ed. 1999). Under the IDEA, however, when there is no previously-established IEP, neither side can claim that its proposal represents the *status quo*.[4] Since the *reason* for the rule does not apply,

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[3] Although MCPS cites various authorities for the proposition that the burden is placed on the party initiating the litigation, most of those authorities qualify their conclusion with words like "ordinarily" and "normally." *See* Resp. Br. at 15. To cite such authorities begs the question whether the case at bar is one of those exceptions to which these words of qualification point.

[4] Seeking to treat the school district's proposal as the *status quo*, the United States mistakenly contends that "[u]nless a parent objects to a proposed IEP, the IDEA allows the IEP to go into effect." U.S. 2005 Amicus Br. at 23 (citing 20 U.S.C. § 1415(b)(6) & (7)). The cited statutes say nothing of the sort. Instead, they are part of the "procedural safeguards" for "children with disabilities and their parents." *See* 20 U.S.C. § 1415(a). When a child is applying for initial admission to public school – as was the case here – there is no previously-established IEP, and implementation of the school district's proposal requires the parents' affirmative consent. 20 U.S.C. § 1415(j). This is exactly the *opposite* of what the United States suggests.

the rule does not apply.[5] *United States v. Chambers*, 291 U.S. 217, 226 (1934).

III. Under the IDEA, Parents and School Districts Have Equal Standing. Where There Is No Agreement, There Is No IEP and No Official Action to Which a Presumption Can Attach.

A strong parental rights measure, the IDEA makes parents and the school district "equal partners" in the development of a child's IEP. 34 C.F.R. Part 300, App. A, Question 9. *See* 20 U.S.C. § 1414(d)(1)(B)(i) (making parents members of IEP team); 20 U.S.C. § 1415(j) (preventing school from implementing initial IEP or changing previously agreed placement without parental consent). Ignored by MCPS – and by the United States – this equal standing in the development of official action is unique in the law. It sets the IDEA apart from other civil rights measures,[6] and it undermines the argument that a presumption of regularity attaches to the school district's IEP proposal.[7]

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[5] Where there is a previously-established IEP, the district court said the burden of proof should be allocated to *whichever* party – parents or school district – seeks to change that IEP. Pet. App. at 34. At least one court has ruled that the burden should be placed on the school district in *all* cases. *Lascari v. Bd. of Educ.*, 560 A.2d 1180, 1188 (N.J. 1989). Rejecting these options, the Fourth Circuit ruled that parents bear the burden even when they challenge a school district's unilateral 90 percent cut in services. *JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 196 (4th Cir. 2005) (citing case at bar).

[6] Thus, the precedents cited by MCPS from other contexts are inapplicable. Additionally, MCPS's reliance on § 504 of the Rehabilitation Act of 1973 ignores the fact that allocation of the burden in such cases is the subject of a circuit split. *See, e.g., Juvelis v. Snider*, 68 F.3d 648, 653 & n.5 (3d Cir. 1995) (holding that the burden of proving a proposed accommodation is unreasonable rests with the defendant).

[7] Such uniqueness also means that placing the burden of proof on school districts would not have the wide-ranging precedential effect that some of MCPS's *amici* suggest. Although most circuits already place the burden on school districts, MCPS and its *amici* have not cited any case that used an IDEA decision as the basis for placing the burden on government in some other context.

1. This Court has said that "[t]he presumption of regularity supports the *official acts* of public officers." *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14 (1926) (emphasis added).[8] Thus, one prerequisite to any such presumption is that the official has taken action of the sort that he is legally authorized to take. Under the IDEA, government may *not* implement a new IEP unilaterally. It must obtain the consent of the parents. Where there is no agreement, there is no IEP. *See* Pet. App. 38 (district court). Accordingly, there is no "official act" to which any presumption of regularity can attach. Indeed, the "regular" course of IDEA proceedings is for parents and school officials to reach a consensus. Where the process leads to an impasse instead, such a manifestly *irregular* result is a very poor basis from which to infer a presumption of regularity.

2. The "presumption of regularity" for officials refers to two different concepts. One is a presumption of "good faith," and the other involves occasions when "an act of a public official require[s] certain predicate acts (or facts) to be lawful." *Tecom, Inc. v. United States*, 2005 U.S. Claims LEXIS 195, at *77 (Fed. Cl. June 27, 2005).[9] Under the second concept, when the official acts, the predicate act or fact is presumed to have occurred. Neither concept applies here. "Good faith" is not an element of whether an IEP is appropriate. Moreover, the predicate fact for an IEP to be lawful or regular is for there to be an agreement between the school district and parents. Where there is an impasse, the predicate fact is missing. Thus, no presumption can arise.

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[8] In any event, the presumption is not a hard and fast rule. It is only "a general working principle." *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004).

[9] Another kind of presumption of regularity is used in connection with review of actions under the Administrative Procedure Act ("APA") *Tecom*, at *83. IDEA disputes are not governed by the APA. Additionally, where Congress wishes to establish a presumption of *correctness*, it knows how to do so. *See* 28 U.S.C. § 2639(a)(1) ("the decision of the Secretary of the Treasury . . . is presumed to be correct"). No such language about a proposed IEP appears in the IDEA.

3. "[T]he law . . . presumes that *every* man, in his *private* and official character, does his duty, until the contrary is proved. . . ." *Bank of United States v. Dandridge*, 25 U.S. 64, 69 (1827) (emphasis added). Thus, parents have a presumption in their favor, too. Because parents and school districts have equal standing in developing an IEP, the two presumptions cancel each other out.

4. Giving the school district a presumption of regularity would also lead to perverse results. In some cases, disputes arise over the extent to which the child's disability may limit the benefit he can derive from services, and thus limit the school's obligation to provide services. *E.g.*, *Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) ("[O]ne might demand only minimal results in the case of the most severely handicapped children."). In such cases, a presumption in favor of the school district's view would translate into a presumption against the child's potential. Such an approach runs contrary to the basic premises of the IDEA and reinforces the stereotypes and discriminatory attitudes the IDEA was designed to combat. If the evidence is in equipoise, the decision should favor providing services to the child.

5. Some MCPS *amici* make the same mistake exposed by the United States five years ago. They "confuse[] *deference*, which concerns the weight to be given to evidence, with the *burden of proof*, the obligation to persuade the trier of fact with the truth of a proposition." U.S. 2000 *Amicus* Brief at 9 (emphasis added).[10] Assuming *arguendo* that the testimony of school employees should be given deference, it does not follow that the school district, as a party, should be spared the burden of proof. Indeed, the contrary would seem true. If, despite the added weight given to its witnesses, the best the school district can do is

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[10] The difference is further illustrated by cases where, instead of marching in lockstep, some school employees support the parents on key issues. *E.g., JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190-94 (4th Cir. 2005). Both sides may have school employees as witness, but both sides cannot have the burden of proof.

to bring the evidence into equipoise, that is another reason to rule in favor of the parents.[11]

IV. Federalism Concerns Do Not Shield the Local School District from the Burden of Proof.

Federalism is an important part of our constitutional system; however, federalism concerns do not govern the outcome here. In a belated attempt to invoke these concerns, MCPS contends that, because the IDEA is a Spending Clause program, any condition imposed on school districts must be stated "unambiguously" in the statute. Resp. Br. at 29 (citing *Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981))). The argument is misplaced.

1. The argument should not be considered because it was "neither pressed nor passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 224 (1990). At every level below, the burden of proof was argued and decided as an issue of *federal* law, with no suggestion that state interests might be implicated.[12]

2. Even now, the State of Maryland has not asserted any state interest in how the burden of proof is allocated. The State has not enacted any statute or regulation on this issue,[13] nor has it filed an *amicus* brief in support of MCPS, choosing instead to maintain neutrality between its citizens and its schools districts.[14] As Maryland's

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[11] MCPS and the United States concede that the burden should be on the school where the school seeks the administrative hearing. Their view that school officials are entitled to a presumption of correctness is at odds with this concession.

[12] Even in the few circuits where the burden is placed on parents, MCPS has cited no decision that bases its result on a federalism or Spending Clause argument.

[13] Thus, the United States is off the mark when it describes the issue as whether "the IDEA . . . conditions federal funds on the requirement that States *modify their rules* and shift the burden of proof in all instances onto their schools." U.S. 2005 *Amicus* Br. at 17 (emphasis added).

[14] *See* Letter of S. Sullivan, Maryland Solicitor General, to E. Williams, dated May 25, 2005 ("It is important for the State Department of

(Continued on following page)

neutrality illustrates, States and their local school districts have sharply different roles in IDEA due process hearings. School districts are litigants, while the role of the State is to act as an "umpire" between those school districts and parents. *See* 20 U.S.C. § 1415(g) (discussing "impartial" and "independent" role of state education agency).[15] Thus, it makes little sense to allow a school district to step into the shoes of the State and assert a federalism interest that the State has declined to assert for itself. *See Pennhurst*, 451 U.S. at 24 (explaining the grant condition must be stated clearly so that "*the States* can knowingly decide whether or not to accept those funds.") (emphasis added). Assuming *arguendo* that States have the right to allocate the burden of proof – one way or the other – in IDEA due process hearings, it says nothing about how the burden should be allocated where the State has *not made* such an allocation. In short, federalism concerns are not implicated in this case. The burden of proof must be guided by other considerations.

3. In any event, the federalism argument is simply unpersuasive. MCPS oversimplifies and overextends the rules of construction applicable to Spending Clause programs under *Pennhurst*. Where Congress has enacted a Spending Clause program to protect individuals against discrimination, this Court has not allowed *Pennhurst* to stand in the way of finding a private right of action, even where the statute is silent. *See Barnes*, 536 U.S. at 185-86 (discussing "judicially-implied" origin of private right of action under two Spending Clause statutes, Title VI and

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Education to maintain its neutrality toward all families and local school systems its serves. For this reason, the Office of Attorney General of Maryland has decided not file a brief as *amicus curiae* in support of either party in *Schaffer v. Weast*.").

[15] This difference in roles is also illustrated by the *amicus* briefs, which show a sharp division between several statewide school board associations and their respective States. *Compare* Brief of Virginia, *et al.* (merits stage), *with* Brief of Virginia Ass'n of School Boards, *et al.*

Title IX).[16] Under the IDEA, the Court need not go so far. The parents' right to bring an administrative action against the school district is in the text of the statute. Assigning the burden of proof to the school district merely supplies a clarifying detail.

4. While sometimes using a "contract-law analogy," this Court "[has] been careful not to imply that *all* contract-law rules apply to Spending Clause legislation." *Barnes*, 536 U.S. at 186 (emphasis in original). Instead, the principal use of the analogy has been to limit the circumstances under which "funding recipients may be held liable for *money damages*." *Id.* (emphasis added). Such a remedy is available "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.* at 187 (emphasis in original). In the case at bar, "damages" are not at issue; and the financial obligation to provide a free appropriate public education is clearly set out in the IDEA. Thus, the *Pennhurst* "contract-analogy" does not shield school districts from the burden of proof.

5. States are also on notice that their school districts must participate in hearings. 20 U.S.C. § 1415(f). Because all hearings must have a burden of proof and other rules to govern them, States are also on notice that issues about such details will inevitably arise. It would be an unwarranted extension of *Pennhurst* to say that all such issues must be resolved in favor of the school district unless the IDEA unambiguously states otherwise.[17] *See Bennett v. Kentucky Dept. of Educ.*, 470 U.S. 656, 669 (1985) (rejecting suggestion that all ambiguities in grant conditions must be resolved in State's favor).[18] Yet, that is the logical result of MCPS's argument.

6. Finally, nineteen States have communicated to this Court their view that there should be a uniform national rule, a position necessarily contrary to the federalism argument advanced by MCPS.[19] Only three States plus one territory – Hawaii, Alaska, Oklahoma and Guam – have supported the MCPS position. *See* Brief of Hawaii, *et al.*[20] Such a weak showing of support for an argument that purportedly vindicates States' rights is especially telling given the fact that most States – a total of 29 – lie in circuits where the burden is now placed on the local school district. The federalism concerns are unfounded.

V. Neither the Text of the IDEA Nor the 2004 Amendments Support MCPS.

MCPS strains to discern in the text of the IDEA and the 2004 amendments some indicia of congressional intent favorable to its position. None can be found.

1. MCPS claims that, because Congress expressly adopted a number of procedural safeguards, it must not have wanted parents to have the additional benefit of a burden of proof placed on the school district. But almost all of these safeguards are reciprocal, benefiting school districts as well as parents. Most provide rights that due

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[16] This Court has already recognized the IDEA as a remedy for violations of the Equal Protection Clause, thus indicating that the law is also based on § 5 of the Fourteenth Amendment. *Smith v. Robinson*, 468 U.S. 992, 1013 (1992). *See* Brief for the Arc of the United States, *et al.* at 18-22 (discussing origin of IDEA as remedy for constitutional violations).

[17] Because the burden of proof is an inherent part of every hearing and *must* be placed on one side or the other, the failure of Congress expressly to allocate the burden does not preclude this Court from doing so. Thus, this case is fundamentally different from *Honig v. Doe*, 484 U.S. 305, 324 (1988), where Congress failed to include a "dangerousness exception" in the IDEA, and the Court declined to do so.

[18] Moreover, because the IDEA uses the term "impartial *due process* hearing," States are on notice that issues about the conduct of the hearings must be resolved, where possible, by principles of due process. *See* Pet. Br. at 22-28; *infra* at 14 n.23.

[19] *See* Brief of Virginia, *et al.* (petition stage); and Brief of Virginia, *et al.* (merits stage).

[20] The author of that brief – the State of Hawaii – is the exception that proves the rule. In Hawaii, there are no local school districts. Hawaii Dep't of Education, "About Us" *available at* http://doe.k12.hi.us. Schools are run directly by the State, thus making Hawaii both umpire and litigant.

process principles would not address. The fact that Congress specified a number of details governing the IEP process does not indicate an intention to allocate the burden of proof one way or the other. Indeed, when Congress wants to fix the burden of proof legislatively, it knows how to do so. *E.g.*, 5 U.S.C. § 556(d) (placing burden of proof on "proponent of a rule or order" under the Administrative Procedure Act ("APA")); 28 U.S.C. § 2639(a)(1) (placing burden of proof on party challenging decision by Secretary of the Treasury). No such statute governs here.

2. MCPS misunderstands the meaning of an IDEA disciplinary provision as it existed between 1997 and the 2004 amendment. *See* Resp. Br. at 26-27. Under this provision, in cases involving student misconduct, a hearing officer could order a temporary change of placement for a disabled child, "if the hearing officer determines that the public agency has demonstrated by *substantial evidence* that maintaining the current placement of such child is *substantially likely* to result in injury to the child or to others." 20 U.S.C. § 1415(k)(2)(A) (emphasis added).[21] The purpose of this provision was to create a different *level* of proof than the "preponderance" level governing other IDEA administrative hearings. It does not imply that Congress wished for parents to bear the burden of proof in disputes involving IEP development.

3. In 2004, Congress adopted several amendments to encourage parents and school districts to resolve their disputes *before* they reach the hearing stage, as well as additional notice requirements and a nationwide statute of limitations. Pointing to these amendments, MCPS contends that congressional policy would be furthered by placing the burden on parents, thereby reducing the number of hearings that parents seek. Resp. Br. at 34. Such an argument mistakenly assumes that, by encouraging the resolution of disputes at pre-hearing stages,

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[21] A related provision, § 1415(k)(6)(B)(i), made it clear that, when dealing with a final decision on the merits, the altered level of proof was no longer applicable.

Congress was more concerned with parental uncooperativeness than with school district intransigence. MCPS offers no basis for such an assumption, and placing the burden on parents is likely to exacerbate the need for hearings by encouraging such intransigence by school districts. MCPS also assumes that reducing hearings – rather than ensuring an appropriate education – is now the polestar of congressional policy, and that Congress wished to reduce the number of hearings even at the expense of discouraging parents from asserting *meritorious* claims.[22] It offers no basis for such an assumption.

4. Finally, MCPS tries to draw support from the term "due process" as it appears in the IDEA. Skipping past the three-part due process test found in *Mathews v. Eldridge*, 424 U.S. 319 (1976), MCPS cites *Lavine v. Milne*, 424 U.S. 577 (1976). Yet, *Lavine* stands for the proposition that it does not offend the Constitution to require applicants for welfare benefits to demonstrate their eligibility. *Id.* at 584-87. Public education is not welfare. Moreover, where parents and a school district are negotiating an IEP, the child's *eligibility* for IDEA services has already been settled. *Lavine* also notes that the burden of proof is "normally" not a constitutional issue, but that a different result may be warranted where "special concerns attend." *Id.* at 585. Removing historic discrimination against children with disabilities – and educating them to become productive citizens – are concerns that are important enough to implicate the burden of proof.[23]

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[22] Congress did intend to discourage claims that are "frivolous, unreasonable or without foundation" by making parents' attorneys liable for legal fees incurred by school districts in such cases. 20 U.S.C. § 1415(i)(3)(B)(i)(II). Claims where the burden of proof is dispositive are manifestly not the ones Congress sought to discourage.

[23] MCPS also misperceives – and fails to refute – petitioners' textual argument. *See* Pet. Br. at 22-28. The point is not that the Constitution operates directly on IDEA hearings in such a way as to allocate the burden to the school district. The point is that, by deliberating using the words "due process," Congress imported that familiar standard into a statutory context. Thus, due process standards apply

(Continued on following page)

VI. "Policy and Fairness" Require the Burden to be Placed on the School District.

"[W]here the statute's language seem[s] insufficiently precise, the natural way to draw the line is in light of the statutory purpose." *United States v. Bacto-Unidisk*, 394 U.S. 784, 799 (1969) (internal quotation marks and citation omitted). The purposes of the IDEA are best served by placing the burden on the school district. MCPS's arguments to the contrary are without merit.

1. MCPS claims that, if the burden of proof is placed on school districts, the number of hearings will expand to unacceptable levels because of uncooperative parents. Resp. Br. at 35. Yet, in most States, school districts already have the burden of proof, and their experience does not support MCPS's dire prediction. In Oklahoma – one of the three States supporting MCPS – the 10th Circuit places the burden on parents. Next door, in Arkansas, the 8th Circuit places the burden on the school district. Yet, in Oklahoma, there were 1.3 actual hearings per 10,000 special education students, compared to 1.2 for Arkansas.[24] Overall, the States in the 10th Circuit saw a total of 6.5 hearings per 10,000 special education students, while the States in the neighboring 8th Circuit saw only 4.4.[25] It should also be noted that the State with the highest incidence of hearings is New York (23.0 per 10,000), while the States with the lowest incidence are Montana, Nebraska and North Dakota (zero). In all four States, the burden is on the school district,[26] a fact strongly suggesting that parental demand for hearings is much more dependent on other factors.

2. MCPS contends that, if the burden is placed on school districts, they will not be able to prepare adequately for due process hearings. Resp. Br. at 33. The claim is not rooted in reality. Long before reaching a hearing, the school district has an obligation to develop an IEP proposal based on the needs of the individual child. If the school district has done its job, it already will have marshaled the facts and expert opinions necessary to explain why its proposal is appropriate. Presenting its position at a hearing should not be difficult. Indeed, the task is made lighter by the fact that the school district only needs to address the subject matter contained in the parents' due process notice. 20 U.S.C. § 1415(f)(3)(B). If the school district believes the notice is insufficient, it has the right to ask the hearing officer to dismiss the case. 20 U.S.C. § 1415(c)(2)(A), (C) & (D) (2005). Moreover, MCPS confuses the burden of proof – *i.e.*, the burden of persuasion – with the burden of production. The case at bar involves only the former. Assigning the burden of proof to the school district would not prevent a hearing officer, in an appropriate case, from calling upon parents to present their evidence first, requiring them to make out a *prima facie* case that the school district would then have the burden of overcoming. Finally, MCPS disregards the right of rebuttal that ordinarily should be afforded to the party having the burden of proof. School districts will not lack skilled and experienced attorneys to press these points. *See* Pet. Br. at 47. In any event, whatever litigation challenges the school district might face if it had the burden of proof, similar difficulties – if not greater ones – would be imposed on the parents if they were to have the burden.

3. A common theme runs through the briefs filed by MCPS and its school system *amici*. The theme is money. They say that special education is too expensive, and that Congress does not appropriate enough money. Certainly, more money for special education – and for education in general – would be desirable. However, this is not a reason to place the burden of proof on parents.

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whether or not the IDEA involves a cognizable liberty or property interest. Prominent among due process standards is the three-step test outlined in *Mathews*, which leads to the conclusion that the burden must be placed on the school district. *See* Pet. Br. at 24-26 (applying *Mathews* test).

[24] *See* Consortium for Appropriate Dispute Resolution in Special Education, *Dispute Resolution National Summary Statistics for School Year 2002-2003: Hearings* (Apr. 20, 2005).

[25] *Id.*

[26] *Id.*

a. It is important to keep costs in perspective. One of the MCPS *amici* complains that school districts spend an estimated $146.5 million per year on "special education mediation, due process and litigation activities." Br. of National Sch. Bd. Ass'n at 6 n.5. Yet, given the 6.7 million children who receive services under the IDEA (13 percent of the student population), this translates into about $22 per child, not an onerous amount to assure compliance with an important civil rights law.[27]

b. Making it more difficult for children with disabilities to obtain the services they need only *masks* the funding problem; it does not solve it. Moreover, it is hardly fair – or constitutional – for school districts to balance their budgets by targeting the disabled. "The inadequacies of the [school district] whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972). Over a decade ago, this Court explained that "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can . . . give the child a free appropriate public education in a public setting." *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). Choosing to litigate rather than educate, MCPS did not heed this admonition.

c. The school systems' focus on money underscores parental concerns that special education officials will cut corners and offer children something less than what the law requires in order to keep within the often arbitrary budgetary limits their school districts have allotted them. "Left to its own devices, a school system is likely to choose the educational option that will help it balance its budget, even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 864-65 (6th Cir. 2004). There is an inevitable institutional incentive for school districts to reduce costs by minimizing a child's individual needs. Calling upon the school district to show that its plan is appropriate provides a well-advised counterweight to that incentive.

4. MCPS suggests that parents know more about their children than the schools do. *See* Resp. Br. at 40. Unfortunately, such a deferential attitude toward parents is markedly different from the dismissive attitude that often prevails at IEP meetings.[28] Moreover, no matter how well they know their children, parents are typically not schooled in the professional disciplines having expertise pertinent to the diagnosis of disabilities and the design of an appropriate IEP.[29]

In any event, knowing the child is only part of the equation. In order to design an appropriate IEP, it is necessary to know what educational resources are available as well as what successes – or failures – a school district may have encountered in its special education programs. The school district has almost exclusive access to this information. *See* Pet. Br. at 42. MCPS ignores this concern. MCPS also ignores the school's control over the creation of school records and its ability to decide unilaterally what observations are included in or excluded from those records. Nor does MCPS address the fact that parents have no right even to observe the program proposed by the school district. *See* Pet. Br. at 41. These are precisely the kinds of concerns that troubled Judge Luttig in his dissent: "[M]ost . . . parents will find the educational program proposed by the school district resistant to challenge: the school district will have better information about the resources available to it, as well as the benefit of its experience with other disabled children." Pet. App. 20.

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[27] By contrast, MCPS per pupil expenditures for 2005 are projected to be $10,537. *See* http://www.mcps.k12.md.us/about/. The $22 "compliance cost" is about 1/5 of one percent of this sum.

[28] *See* Brief for the Arc of the United States, *et al.* at 14-15 (citing sources); Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 26-27 (citing sources); Brief of Various Autism Organizations at 12 (citing sources).

[29] The difficulty encountered by parents in obtaining expert testimony has been compounded by the recent decision of the D.C. Circuit that the IDEA does not allow prevailing parents to recover expert witness fees. *Goldring v. District of Columbia*, No. 04-7116, 2005 U.S. App. LEXIS 15235 (D.C. Cir. July 26, 2005). As a result of *Goldring*, a majority of circuits that have decided the issue have ruled against recoverability of such fees. *Id.* at * 7-8.

5. The parties agree that allocation of the burden of proof will have a "ripple" effect, affecting negotiation dynamics between parents and school officials well before the hearing stage. They disagree, however, on what that effect will be. Disparaging the citizens it was created to serve – and giving no evidence for its allegations – MCPS contends that placing the burden on school districts will encourage parents to be uncooperative and "snub" the IEP process. Resp. Br. at 36. Petitioners maintain that placing the burden on parents will strengthen the hand of often-intransigent school district bureaucracies, and that allocating the burden to school officials will provide "an additional incentive" for those officials to draft IEPs that will provide the child with an appropriate education. Pet. Br. at 33-34 (quoting U.S. 2000 Amicus Brief at 12). The latter point is amply illustrated by the facts of the case at bar. *See supra* at 1; Pet. Br. at 13.

Resolution of these competing claims should be guided by the purposes of the IDEA, which arose out of a deep concern – justified by experience – that many children with disabilities suffer discrimination at the hands of local school districts. MCPS does not deny that the prejudice leading to the enactment of the IDEA still persists. *See* Pet. Br. at 31. Indeed, the obligations of the IDEA have not been universally welcomed. Perhaps the most striking example is found in *Felix v. Cayetano*, No. 93-00367 (D. Haw. filed May 4, 1993), which involved the public schools of Hawaii, author of an *amicus* brief supporting MCPS. In *Felix*, the Hawaii public schools spent over a decade under supervision by a federal court because the State "systemically failed to provide required and necessary educational and mental health services to qualified handicapped children . . . in violation of the [IDEA]." *Felix*, summary judgment order (May 24, 1994). While Hawaii was released from court

supervision on May 31, 2005, it would be naïve to suppose that the attitudes that contributed to the need for such a remedy have been entirely eliminated. It would likewise be naïve – and unfair to Hawaii – to believe that such attitudes are only a problem in that one State.[30]

As this Court observed in another civil rights context, "the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms." *Freeman v. Pitts*, 503 U.S. 467, 490 (1992). So, too, it is with discrimination against the disabled.[31] The persistence and subtlety of such discrimination means that parents have more to fear from government, than government has to fear from parents. On the whole, it is again government – not parents – that is more in need of an incentive to cooperate.

6. Finally, the consequences of an erroneous decision must be taken into account. The child will suffer far more harm if contested services are erroneously denied, than the school district will suffer if those services are erroneously ordered. *See* Pet. Br. at 34-39. Although petitioners were able to provide Brian the services he needed until MCPS finally relented, not all children will be so fortunate; and delay can be disastrous. "[A] few months can make a world of difference in the life of [a] child." *Foster v. District of Columbia Bd. of Educ.*, No. CA-82-0095, EHLR

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[30] Widespread violations of the IDEA also have led to court supervision of public schools in Los Angeles and Chicago; and, in Maryland, state officials have charged Baltimore public schools with "a failure of extraordinary magnitude" in the education of disabled students. *Chanda Smith v. Los Angeles Unified Sch. Dist.*, CV 93-7044-RSWL (C.D. Cal. filed 1993) (history and current decree *available at* www.oimla.com); *Corey H. v. Bd. of Educ.*, 995 F. Supp. 900 (N.D. Ill. 1998); Nick Anderson, *Maryland Seeks Role in Special-Ed For Baltimore*, Washington Post, July 26, 2005, at B-04.

[31] *See, e.g., Americans with Disabilities Act*, 42 U.S.C. § 12101(a)(3) (finding that "discrimination against individuals with disabilities persists in such critical areas as . . . education . . . ").

553:520 (D.D.C. Feb. 22, 1982).[32] MCPS makes no attempt to refute this assessment, nor does it dispute the special solicitude that our law shows for the welfare of children and the rights of parents, *see* Pet. Br. at 38, nor does it deny that, under this Court's jurisprudence, the consequences of error must be considered when the burden of proof is at issue. *See* Pet. Br. at 34. These tacit concessions by MCPS provide a compelling reason to place the burden on the school district. Indeed, to do otherwise would deny children with disabilities the full measure of protection that this landmark civil rights measure was designed to ensure.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

BRIAN SCHAFFER, a minor,
by his Parents and
next friends
JOCELYN SCHAFFER;
MARTIN SCHAFFER

WILLIAM H. HURD*
SIRAN S. FAULDERS
PAIGE S. FITZGERALD
TROUTMAN SANDERS, LLP
1001 Haxall Point
Richmond, Virginia 23219
(804) 697-1478 (phone)
(804) 698-6058 (fax)

MICHAEL J. EIG
HAYLIE M. ISEMAN
MICHAEL J. EIG &
ASSOCIATES, P.C.
5454 Wisconsin Avenue
Chevy Chase, Maryland 20815
(301) 657-1740 (phone)
(301) 657-3843 (fax)

**Counsel of Record*

July 29, 2005

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[32] *See, e.g.*, Henri E. Cauvin, *Some Parents Push for Alternative to D.C.'s Special-Ed*, Washington Post, June 12, 2005, at C-13 (reporting case of severely disabled child who may never learn to chew or swallow because school officials insisted that therapy to address those skills was not needed; court later ordered private placement).

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, SCHAFFER ET UX, ET AL. *v.* WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 04–698. Argued October 5, 2005—Decided November 14, 2005

To ensure disabled children a "free appropriate public education," 20 U. S. C. A. §1400(d)(1)(A), the Individuals with Disabilities Education Act (IDEA or Act) requires school districts to create an "individualized education program" (IEP) for each disabled child, §1414(d), and authorizes parents challenging their child's IEP to request an "impartial due process hearing," §1415(f), but does not specify which party bears the burden of persuasion at that hearing. After an IDEA hearing initiated by petitioners, the Administrative Law Judge held that they bore the burden of persuasion and ruled in favor of respondents. The District Court reversed, concluding that the burden of persuasion is on the school district. The Fourth Circuit reversed the District Court, concluding that petitioners had offered no persuasive reason to depart from the normal rule of allocating the burden to the party seeking relief.

Held: The burden of persuasion in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district. Pp. 6–12.

(a) Because IDEA is silent on the allocation of the burden of persuasion, this Court begins with the ordinary default rule that plaintiffs bear the burden regarding the essential aspects of their claims. Although the ordinary rule admits of exceptions, decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding—as petitioners urge the Court to do here—are extremely rare. Absent some reason to believe that Congress intended otherwise, the Court will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief. Pp. 6–8.

(b) Petitioners' arguments for departing from the ordinary default rule are rejected. Petitioners' assertion that putting the burden of persuasion on school districts will help ensure that children receive a free appropriate public education is unavailing. Assigning the burden to schools might encourage them to put more resources into preparing IEPs and presenting their evidence, but IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. There is reason to believe that a great deal is already spent on IDEA administration, and Congress has repeatedly amended the Act to reduce its administrative and litigation-related costs. The Act also does not support petitioners' conclusion, in effect, that every IEP should be assumed to be invalid until the school district demonstrates that it is not. Petitioners' most plausible argument—that ordinary fairness requires that a litigant not have the burden of establishing facts peculiarly within the knowledge of his adversary, *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5—fails because IDEA gives parents a number of procedural protections that ensure that they are not left without a realistic chance to access evidence or without an expert to match the government. Pp. 8–11.

377 F. 3d 449, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a concurring opinion. GINSBURG, J., and BREYER, J., filed dissenting opinions. ROBERTS, C. J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS *v.* JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE O'CONNOR delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U. S. C. A. §1400 *et seq.* (main ed. and Supp. 2005), is a Spending Clause statute that seeks to ensure that "all children with disabilities have available to them a free appropriate public education," §1400(d)(1)(A). Under IDEA, school districts must create an "individualized education program" (IEP) for each disabled child. §1414(d). If parents believe their child's IEP is inappropriate, they may request an "impartial due process hearing." §1415(f). The Act is silent, however, as to which party bears the burden of persuasion at such a hearing. We hold that the burden lies, as it typically does, on the party seeking relief.

I

A

Congress first passed IDEA as part of the Education of the Handicapped Act in 1970, 84 Stat. 175, and amended it substantially in the Education for All Handicapped Children Act of 1975, 89 Stat. 773. At the time the majority of disabled children in America were "either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out,'" H. R. Rep. No. 94–332, p. 2 (1975). IDEA was intended to reverse this history of neglect. As of 2003, the Act governed the provision of special education services to nearly 7 million children across the country. See Dept. of Education, Office of Special Education Programs, Data Analysis System, http://www.ideadata.org/tables27th/ar_aa9.htm (as visited Nov. 9, 2005, and available in Clerk of Court's case file).

IDEA is "frequently described as a model of 'cooperative federalism.'" *Little Rock School Dist.* v. *Mauney*, 183 F. 3d 816, 830 (CA8 1999). It "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] imposes significant requirements to be followed in the discharge of that responsibility." *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley*, 458 U. S. 176, 183 (1982). For example, the Act mandates cooperation and reporting between state and federal educational authorities. Participating States must certify to the Secretary of Education that they have "policies and procedures" that will effectively meet the Act's conditions. 20 U. S. C. §1412(a). (Unless otherwise noted, all citations to the Act are to the pre-2004 version of the statute because this is the version that was in effect during the proceedings below. We note, however, that nothing in the recent 2004 amendments, 118 Stat. 2674, appears to materially affect the rule announced here.) State educational agencies, in turn, must ensure that local schools and teachers are meeting the State's educational standards. 20 U. S. C. §§1412(a)(11), 1412(a)(15)(A). Local educational agencies (school boards or other administrative bodies) can receive IDEA funds only if they certify to a state educational agency that they are acting in accordance with the State's policies and procedures. §1413(a)(1).

The core of the statute, however, is the cooperative process that it establishes between parents and schools. *Rowley, supra*, at 205–206 ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"). The central vehicle for this collaboration is the IEP process. State educational authorities must identify and evaluate disabled children, §§1414(a)–(c), develop an IEP for each one, §1414(d)(2), and review every IEP at least once a year, §1414(d)(4). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide. §1414(d)(1)(A).

Parents and guardians play a significant role in the IEP process. They must be informed about and consent to evaluations of their child under the Act. §1414(c)(3). Parents are included as members of "IEP teams." §1414(d)(1)(B). They have the right to examine any records relating to their child, and to obtain an "independent educational evaluation of the[ir] child." §1415(b)(1). They must be given written prior notice of any changes in an IEP, §1415(b)(3), and be notified in writing of the procedural safeguards available to them under the Act, §1415(d)(1). If parents believe that an IEP is not appropriate, they may seek an administrative "impartial due process hearing." §1415(f). School districts may also seek such hearings, as Congress clarified in the 2004 amendments. See S. Rep. No. 108–185, p. 37 (2003). They may do so, for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated. As a practical matter, it appears that most hearing requests come from parents rather than schools. Brief for Petitioners 7.

Although state authorities have limited discretion to determine who conducts the hearings, §1415(f)(1)), and responsibility generally for establishing fair hearing procedures, §1415(a), Congress has chosen to legislate the central components of due process hearings. It has imposed minimal pleading standards, requiring parties to file complaints setting forth "a description of the nature of the problem," §1415(b)(7)(B)(ii), and "a proposed resolution of the problem to the extent known and available . . . at the time," §1415(b)(7)(B)(iii). At the hearing, all parties may be accompanied by counsel, and may "present evidence and confront, cross-examine, and compel the attendance of witnesses." §§1415(h)(1)–(2). After the hearing, any aggrieved party may bring a civil action in state or federal court. §1415(i)(2). Prevailing parents may also recover attorney's fees. §1415(i)(3)(B). Congress has never explicitly stated, however, which party should bear the burden of proof at IDEA hearings.

B

This case concerns the educational services that were due, under IDEA, to petitioner Brian Schaffer. Brian suffers from learning disabilities and speech-language impairments. From prekindergarten through seventh grade he attended a private school and struggled academically. In 1997, school officials informed Brian's mother that he needed a school that could better accommodate his needs. Brian's parents contacted respondent Montgomery County Public Schools System (MCPS) seeking a placement for him for the following school year.

MCPS evaluated Brian and convened an IEP team. The committee generated an initial IEP offering Brian a place in either of two MCPS middle schools. Brian's parents were not satisfied with the arrangement, believing that Brian needed smaller classes and more intensive services. The Schaffers thus enrolled Brian in another private school, and initiated a due process hearing challenging the IEP and seeking compensation for the cost of Brian's subsequent private education.

In Maryland, IEP hearings are conducted by administrative law judges (ALJs). See Md. Educ. Code Ann. §8–413(c) (Lexis 2004). After a 3-day hearing, the ALJ deemed the evidence close, held that the parents bore the burden of persuasion, and ruled in favor of the school district. The parents brought a civil action challenging the result. The United States District Court for the District of Maryland reversed and remanded, after concluding that the burden of persuasion is on the school district. *Brian S.* v. *Vance*, 86 F. Supp. 2d 538 (2000). Around the same time, MCPS offered Brian a placement in a high school with a special learning center. Brian's parents accepted, and Brian was educated in that program until he graduated from high school. The suit remained alive, however, because the parents sought compensation for the private school tuition and related expenses.

Respondents appealed to the United States Court of Appeals for the Fourth Circuit. While the appeal was pending, the ALJ reconsidered the case, deemed the evidence truly in "equipoise," and ruled in favor of the parents. The Fourth Circuit vacated and remanded the appeal so that it could consider the burden of proof issue along with the merits on a later appeal. The District Court reaffirmed its ruling that the school district has the burden of proof. 240 F. Supp. 2d 396 (Md. 2002). On appeal, a divided panel of the Fourth Circuit reversed. Judge Michael, writing for the majority, concluded that petitioners offered no persuasive reason to "depart from the normal rule of allocating the burden to the party seeking relief." 377 F. 3d 449, 453 (2004). We granted certiorari, 543 U. S. 1145 (2005), to resolve the following question: At an administrative hearing assessing the appropriateness of an IEP, which party bears the burden of persuasion?

II

A

The term "burden of proof" is one of the "slipperiest member[s] of the family of legal terms." 2 J. Strong, McCormick on Evidence §342, p. 433 (5th ed. 1999) (hereinafter McCormick). Part of the confusion surrounding the term arises from the fact that historically, the concept encompassed two distinct burdens: the "burden of persuasion," *i.e.*, which party loses if the evidence is closely balanced, and the "burden of production," *i.e.*, which party bears the obligation to come forward with the evidence at different points in the proceeding. *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries*, 512 U. S. 267, 272 (1994). We note at the outset that this case concerns only the burden of persuasion, as the parties agree, Brief for Respondents 14; Reply Brief for Petitioners 15, and when we speak of burden of proof in this opinion, it is this to which we refer.

When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute. The plain text of IDEA is silent on the allocation of the burden of persuasion. We therefore begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims. McCormick §337, at 412 ("The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure or proof or persuasion"); C. Mueller & L. Kirkpatrick, Evidence §3.1, p. 104 (3d ed. 2003) ("Perhaps the broadest and most accepted idea is that the person who seeks court action should justify the request, which means that the plaintiffs bear the burdens on the elements in their claims").

Thus, we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims. For example, Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2 *et seq.*, does not directly state that plaintiffs bear the "ultimate" burden of persuasion, but we have so concluded. *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 511 (1993); *id.*, at 531 (SOUTER, J., dissenting). In numerous other areas, we have presumed or held that the default rule applies. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561 (1992) (standing); *Cleveland* v. *Policy Management Systems Corp.*, 526 U. S. 795, 806 (1999) (Americans with Disabilities Act); *Hunt* v. *Cromartie*, 526 U. S. 541, 553 (1999) (equal protection); *Wharf (Holdings) Ltd.* v. *United Int'l Holdings, Inc.*, 532 U. S. 588, 593 (2001) (securities fraud); *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975) (preliminary injunctions); *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 287 (1977) (First Amendment). Congress also expressed its approval of the general rule when it chose to apply it to administrative proceedings under the Administrative Procedure Act, 5 U. S. C. §556(d); see also *Greenwich Collieries*, *supra*, at 271.

The ordinary default rule, of course, admits of exceptions. See McCormick §337, at 412–415. For example, the burden of persuasion as to certain elements of a plantiff's claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions. See, *e.g.*, *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 44–45 (1948). Under some circumstances this Court has even placed the burden of persuasion over an entire claim on the defendant. See *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 494 (2004). But while the normal default rule does not solve all cases, it certainly solves most of them. Decisions that place the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding—as petitioners urge us to do here—are extremely rare. Absent some reason to believe that Congress intended otherwise, therefore, we will conclude that the burden of persuasion lies where it usually falls, upon the party seeking relief.

B

Petitioners contend first that a close reading of IDEA's text compels a conclusion in their favor. They urge that we should interpret the statutory words "due process" in light of their constitutional meaning, and apply the balancing test established by *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). Even assuming that the Act incorporates constitutional due process doctrine, *Eldridge* is no help to petitioners, because "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine* v. *Milne*, 424 U. S. 577, 585 (1976).

Petitioners next contend that we should take instruction from the lower court opinions of *Mills* v. *Board of Education*, 348 F. Supp. 866 (D. C. 1972), and *Pennsylvania Association for Retarded Children* v. *Commonwealth*, 334 F. Supp. 1257 (ED Pa. 1971) (hereinafter *PARC*). IDEA's drafters were admittedly guided "to a significant extent" by these two landmark cases. *Rowley*, 458 U. S., at 194. As the court below noted, however, the fact that Congress "took a number of the procedural safeguards from *PARC* and *Mills* and wrote them directly into the Act" does not allow us to "conclude . . . that Congress intended to adopt the ideas that it failed to write into the text of the statute." 377 F. 3d, at 455.

Petitioners also urge that putting the burden of persuasion on school districts will further IDEA's purposes because it will help ensure that children receive a free appropriate public education. In truth, however, very few cases will be in evidentiary equipoise. Assigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs and presenting their evidence. But IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services. Moreover, there is reason to believe that a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing. See Department of Education, J. Chambers, J. Harr, & A. Dhanani, What Are We Spending on Procedural Safeguards in Special Education 1999–2000, p. 8 (May 2003) (prepared under contract by American Institute for Research, Special Education Expenditure Project). Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes. Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105–17, §615(e), 111 Stat. 90, 20 U. S. C. §1415(e). In 2004, Congress added a mandatory "resolution session" prior to any due process hearing. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108–446, §615(7)(f)(1)(B), 118 Stat. 2720, 20 U. S. C. A. §1415(f)(1)(B) (Supp. 2005). It also made new findings that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways," and that "[t]eachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes." §§1400(c)(8)–(9).

Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals. It also includes a so-called "stay-put" provision, which requires a child to remain in his or her "then-current educational placement" during the pendency of an IDEA hearing. §1415(j). Congress could have required that a child be given the educational placement that a parent requested during a dispute, but it did no such thing. Congress appears to have presumed instead that, if the Act's procedural requirements are respected, parents will prevail when they have legitimate grievances. See *Rowley, supra*, at 206 (noting the "legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP").

Petitioners' most plausible argument is that "[t]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States* v. *New York, N. H. & H. R. Co.*, 355 U. S. 253, 256, n. 5 (1957); see also *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 626 (1993). But this "rule is far from being universal, and has many qualifications upon its application." *Greenleaf's Lessee* v. *Birth*, 6 Pet. 302, 312 (1832); see also McCormick §337, at 413 ("Very often one must plead and prove matters as to which his adversary has superior access to the proof"). School districts have a "natural advantage" in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U. S. 359, 368 (1985). As noted above, parents have the right to review all records that the school possesses in relation to their child. §1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." *Ibid.* The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR §300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Additionally, in 2004, Congress added provisions requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision. Pub. L. 108–446, §615(c)(2)(B)(i)(I), 118 Stat. 2718, 20 U. S. C. A. §1415(c)(2)(B)(i)(*I*) (Supp. 2005). Prior to a hearing, the parties must disclose evaluations and recommendations that they intend to rely upon. 20 U. S. C. §1415(f)(2). IDEA hearings are deliberately informal and intended to give ALJs the flexibility that they need to ensure that each side can fairly present its evidence. IDEA, in fact, requires state authorities to organize hearings in a way that guarantees parents and children the procedural protections of the Act. See §1415(a). Finally, and perhaps most importantly, parents may recover attorney's fees if they prevail. §1415(i)(3)(B). These protections ensure that the school bears no unique informational advantage.

III

Finally, respondents and several States urge us to decide that States may, if they wish, override the default rule and put the burden always on the school district. Several States have laws or regulations purporting to do so, at least under some circumstances. See, *e.g.,* Minn. Stat. §125A.091, subd. 16 (2004); Ala. Admin. Code Rule 290–8–9–.08(8)(c)(6) (Supp. 2004); Alaska Admin. Code tit. 4, §52.550(e)(9) (2003); Del. Code Ann., Tit. 14, §3140 (1999). Because no such law or regulation exists in Maryland, we need not decide this issue today. JUSTICE BREYER contends that the allocation of the burden ought to be left *entirely* up to the States. But neither party made this argument before this Court or the courts below. We therefore decline to address it.

We hold no more than we must to resolve the case at hand: The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is Brian, as represented by his parents. But the rule applies with equal effect to school districts: If they seek to challenge an IEP, they will in turn bear the burden of persuasion before an ALJ. The judgment of the United States Court of Appeals for the Fourth Circuit is, therefore, affirmed.

It is so ordered.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT
FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL.,
PETITIONERS *v.* JERRY WEAST, SUPERINTEN-
DENT, MONTGOMERY COUNTY PUBLIC
SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE STEVENS, concurring.

It is common ground that no single principle or rule solves all cases by setting forth a general test for ascertaining the incidence of proof burdens when both a statute and its legislative history are silent on the question. See *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 494, n. 17 (2004); see also *ante*, at 7; *post*, at 1–2 (GINSBURG, J., dissenting). Accordingly, I do not understand the majority to disagree with the proposition that a court, taking into account "'policy considerations, convenience, and fairness,'" *post*, at 1 (GINSBURG, J., dissenting), could conclude that the purpose of a statute is best effectuated by placing the burden of persuasion on the defendant. Moreover, I agree with much of what JUSTICE GINSBURG has written about the special aspects of this statute. I have, however, decided to join the Court's disposition of this case, not only for the reasons set forth in JUSTICE O'CONNOR's opinion, but also because I believe that we should presume that public school officials are properly performing their difficult responsibilities under this important statute.

SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS *v.* JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE GINSBURG, dissenting.

When the legislature is silent on the burden of proof, courts ordinarily allocate the burden to the party initiating the proceeding and seeking relief. As the Fourth Circuit recognized, however, "other factors," prime among them "policy considerations, convenience, and fairness," may warrant a different allocation. 377 F. 3d 449, 452 (2004) (citing 2 J. Strong, McCormick on Evidence §337, p. 415 (5th ed. 1999) (allocation of proof burden "will depend upon the weight . . . given to any one or more of several factors, including: . . . special policy considerations . . .[,] convenience, . . . [and] fairness")); see also 9 J. Wigmore, Evidence §2486, p. 291 (J. Chadbourn rev. ed. 1981) (assigning proof burden presents "a question of policy and fairness based on experience in the different situations"). The Court has followed the same counsel. See *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 494, n. 17 (2004) ("No 'single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." (quoting Wigmore, *supra*, §2486, p. 288; emphasis deleted)). For reasons well stated by Circuit Judge Luttig, dissenting in the Court of Appeals, 377 F. 3d, at 456–459, I am persuaded that "policy considerations, convenience, and fairness" call for assigning the burden of proof to the school district in this case.

The Individuals with Disabilities Education Act (IDEA), 20 U. S. C. §1400 *et seq.*, was designed to overcome the pattern of disregard and neglect disabled children historically encountered in seeking access to public education. See §1400(c)(2) (congressional findings); S. Rep. No. 94–168, pp. 6, 8–9 (1975); *Mills* v. *Board of Ed. of District of Columbia*, 348 F. Supp. 866 (DC 1972); *Pennsylvania Assn. for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 1257 (ED Pa. 1971), and 343 F. Supp. 279 (ED Pa. 1972). Under typical civil rights and social welfare legislation, the complaining party must allege and prove discrimination or qualification for statutory benefits. See, *e.g., St. Mary's Honor Center* v. *Hicks,* 509 U. S. 502, 511 (1993) (Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e *et seq.*); *Director, Office of Workers' Compensation Programs* v. *Greenwich Collieries,* 512 U. S. 267, 270 (1994) (Black Lung Benefits Act, 30 U. S. C. §901 *et seq.*). The IDEA is atypical in this respect: It casts an affirmative, beneficiary-specific obligation on providers of public education. School districts are charged with responsibility to offer to each disabled child an individualized education program (IEP) suitable to the child's special needs. 20 U. S. C. §§1400(d)(1), 1412(a)(4), 1414(d). The proponent of the IEP, it seems to me, is properly called upon to demonstrate its adequacy.

Familiar with the full range of education facilities in the area, and informed by "their experiences with other, similarly-disabled children," 377 F. 3d, at 458 (Luttig, J., dissenting), "the school district is . . . in a far better position to demonstrate that it has fulfilled [its statutory] obligation than the disabled student's parents are in to show that the school district has failed to do so," *id.*, at 457. Accord *Oberti* v. *Board of Ed. of Borough of Clemen-*

ton School Dist., 995 F. 2d 1204, 1219 (CA3 1993) ("In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents."); *Lascari* v. *Board of Ed. of Ramapo Indian Hills Regional High School Dist.*, 116 N. J. 30, 45–46, 560 A. 2d 1180, 1188–1189 (1989) (in view of the school district's "better access to relevant information," parent's obligation "should be merely to place in issue the appropriateness of the IEP. The school board should then bear the burden of proving that the IEP was appropriate. In reaching that result, we have sought to implement the intent of the statutory and regulatory schemes.").[1]

Understandably, school districts striving to balance their budgets, if "[l]eft to [their] own devices," will favor educational options that enable them to conserve resources. *Deal* v. *Hamilton County Bd. of Ed.*, 392 F. 3d 840, 864–865 (CA6 2004). Saddled with a proof burden in administrative "due process" hearings, parents are likely to find a district-proposed IEP "resistant to challenge." 377 F. 3d, at 459 (Luttig, J., dissenting). Placing the burden on the district to show that its plan measures up to the statutorily mandated "free appropriate public education," 20 U. S. C. §1400(d)(1)(A), will strengthen school officials' resolve to choose a course genuinely tailored to the child's individual needs.[2]

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[1] The Court suggests that the IDEA's stay-put provision, 20 U. S. C. §1415(j), supports placement of the burden of persuasion on the parents. *Ante*, at 10. The stay-put provision, however, merely preserves the status quo. It would work to the advantage of the child and the parents when the school seeks to cut services offered under a previously established IEP. True, Congress did not require that "a child be given the educational placement that a parent requested during a dispute." *Ibid.* But neither did Congress require that the IEP advanced by the school district go into effect during the pendency of a dispute.

The Court acknowledges that "[a]ssigning the burden of persuasion to school districts might encourage schools to put more resources into preparing IEPs." *Ante*, at 9. Curiously, the Court next suggests that resources spent on developing IEPs rank as "administrative expenditures" not as expenditures for "educational services." *Ibid.* Costs entailed in the preparation of suitable IEPs, however, are the very expenditures necessary to ensure each child covered by IDEA access to a free appropriate education. These outlays surely relate to "educational services." Indeed, a carefully designed IEP may ward off disputes productive of large administrative or litigation expenses.

This case is illustrative. Not until the District Court ruled that the school district had the burden of persuasion did the school design an IEP that met Brian Schaffer's special educational needs. See *ante*, at 5; Tr. of Oral Arg. 21–22 (Counsel for the Schaffers observed that "Montgomery County . . . gave [Brian] the kind of services he had sought from the beginning . . . once [the school district was] given the burden of proof."). Had the school district, in the first instance, offered Brian a public or private school placement equivalent to the one the district ultimately provided, this entire litigation and its attendant costs could have been avoided.

Notably, nine States, as friends of the Court, have urged that placement of the burden of persuasion on the school district best comports with IDEA's aim. See Brief for

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[2] The Court observes that decisions placing "the *entire* burden of persuasion on the opposing party at the *outset* of a proceeding . . . are extremely rare." *Ante*, at 8. In cases of this order, however, the persuasion burden is indivisible. It must be borne *entirely* by one side or the other: Either the school district must establish the adequacy of the IEP it has proposed or the parents must demonstrate the plan's inadequacy.

Virginia et al. as *Amici Curiae*. If allocating the burden to school districts would saddle school systems with inordinate costs, it is doubtful that these States would have filed in favor of petitioners. Cf. Brief for United States as *Amicus Curiae* Supporting Appellees Urging Affirmance in 00–1471 (CA4), p. 12 ("Having to carry the burden of proof regarding the adequacy of its proposed IEP . . . should not substantially increase the workload for the school.").[3]

One can demur to the Fourth Circuit's observation that courts "do not automatically assign the burden of proof to the side with the bigger guns," 377 F. 3d, at 453, for no such reflexive action is at issue here. It bears emphasis that "the vast majority of parents whose children require the benefits and protections provided in the IDEA" lack "knowledg[e] about the educational resources available to their [child]" and the "sophisticat[ion]" to mount an effective case against a district-proposed IEP. *Id.*, at 458 (Luttig, J., dissenting); cf. 20 U. S. C. §1400(c)(7)–(10). See generally M. Wagner, C. Marder, J. Blackorby, & D. Cardoso, The Children We Serve: The Demographic Characteristics of Elementary and Middle School Students with Disabilities and their Households (Sept. 2002), available at http://www.seels.net/designdocs/SEELS_Children_We_Serve_Report.pdf (as visited Nov. 8, 2005, and available in Clerk of Court's case file). In this setting, "the party with the 'bigger guns' also has better access to information, greater expertise, and an affirmative obligation to provide the contested services." 377 F. 3d, at 458 (Luttig, J., dissenting). Policy considerations, convenience, and fairness, I think it plain, point in the same direction. Their collective weight warrants a rule requiring a school district, in "due process" hearings, to explain persuasively why its proposed IEP satisfies IDEA's standards. *Ibid.* I would therefore reverse the judgment of the Fourth Circuit.

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[3] Before the Fourth Circuit, the United States filed in favor of the Schaffers; in this Court, the United States supported Montgomery County.

SUPREME COURT OF THE UNITED STATES

No. 04–698

BRIAN SCHAFFER, A MINOR, BY HIS PARENTS AND NEXT FRIENDS, JOCELYN AND MARTIN SCHAFFER, ET AL., PETITIONERS *v.* JERRY WEAST, SUPERINTENDENT, MONTGOMERY COUNTY PUBLIC SCHOOLS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[November 14, 2005]

JUSTICE BREYER, dissenting.

As the majority points out, the Individuals with Disabilities Education Act (Act), 20 U. S. C. §1400 *et seq.*, requires school districts to "identify and evaluate disabled children, . . . develop an [Individualized Education Program] for each one . . . , and review every IEP at least once a year." *Ante*, at 3 (opinion of the Court). A parent dissatisfied with "any matter relating [1] to the identification, evaluation, or educational placement of the child," or [2] to the "provision of a free appropriate public education," of the child, has the opportunity "to resolve such disputes through a mediation process." 20 U. S. C. A. §§1415(a), (b)(6)(A), (k) (Supp. 2005). The Act further provides the parent with "an opportunity for an impartial due process hearing" provided by the state or local education agency. §1415(f)(1)(A). If provided locally, either party can appeal the hearing officer's decision to the state educational agency. §1415(g). Finally, the Act allows any "party aggrieved" by the results of the state hearing(s), "to bring a civil action" in a federal district court. §1415(i)(2)(A). In sum, the Act provides for school board action, followed by (1) mediation, (2) an impartial state due process hearing with the possibility of state appellate review, and, (3) federal district court review.

The Act also sets forth minimum procedures that the parties, the hearing officer, and the federal court must follow. See, *e.g.*, §1415(f)(1) (notice); §1415(f)(2) (disclosures); §1415(f)(3) (limitations on who may conduct the hearing); §1415(g) (right to appeal); §1415(h)(1) ("the right to be accompanied and advised by counsel"); §1415(h)(2) ("the right to present evidence and confront, cross-examine, and compel the attendance of witnesses"); §1415(h)(3) (the right to a transcript of the proceeding); §1415(h)(4) ("the right to written . . . findings of fact and decisions"). Despite this detailed procedural scheme, the Act is silent on the question of who bears the burden of persuasion at the state "due process" hearing.

The statute's silence suggests that Congress did not think about the matter of the burden of persuasion. It is, after all, a relatively minor issue that should not often arise. That is because the parties will ordinarily introduce considerable evidence (as in this case where the initial 3-day hearing included testimony from 10 witnesses, 6 qualified as experts, and more than 50 exhibits). And judges rarely hesitate to weigh evidence, even highly technical evidence, and to decide a matter on the merits, even when the case is a close one. Thus, cases in which an administrative law judge (ALJ) finds the evidence in precise equipoise should be few and far between. Cf. *O'Neal* v. *McAninch*, 513 U. S. 432, 436–437 (1995). See also Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108–446, §§615(f)(3)(A)(ii)–(iv), 118 Stat. 2721, 20 U. S. C. A. §§1415(f)(3)(A)(ii)–(iv) (Supp. 2005) (requiring appointment of ALJ with technical capacity to understand Act).

Nonetheless, the hearing officer held that before him was that *rara avis*—a case of perfect evidentiary equipoise. Hence we must infer from Congress' silence (and from the rest of the statutory scheme) which party—the parents or the school district—bears the burden of persuasion.

One can reasonably argue, as the Court holds, that the risk of nonpersuasion should fall upon the "individual desiring change." That, after all, is the rule courts ordinarily apply when an individual complains about the lawfulness of a government action. *E.g., ante,* at 6–11 (opinion of the Court); 377 F. 3d 449 (CA4 2004) (case below); *Devine* v. *Indian River County School Bd.*, 249 F. 3d 1289 (CA11 2001). On the other hand, one can reasonably argue to the contrary, that, given the technical nature of the subject matter, its human importance, the school district's superior resources, and the district's superior access to relevant information, the risk of nonpersuasion ought to fall upon the district. *E.g., ante,* at 1–5 (GINSBURG, J., dissenting); 377 F. 3d, at 456–459 (Luttig, J., dissenting); *Oberti* v. *Board of Ed.*, 995 F. 2d 1204 (CA3 1993); *Lascari* v. *Board of Ed.*, 116 N. J. 30, 560 A. 2d 1180 (1989). My own view is that Congress took neither approach. It did not decide the "burden of persuasion" question; instead it left the matter to the States for decision.

The Act says that the "establish[ment]" of "procedures" is a matter for the "State" and its agencies. §1415(a). It adds that the hearing in question, an administrative hearing, is to be conducted by the "State" or "local educational agency." 20 U. S. C. A. §1415(f)(1)(A) (Supp. 2005). And the statute as a whole foresees state implementation of federal standards. §1412(a); *Cedar Rapids Community School Dist.* v. *Garret F.*, 526 U. S. 66, 68 (1999); *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty.* v. *Rowley,* 458 U. S. 176, 208 (1982). The minimum federal procedural standards that the Act specifies are unrelated to the "burden of persuasion" question. And different States, consequently and not surprisingly, have resolved it in different ways. See, *e.g.*, Alaska Admin.

Code, tit. 4, §52.550(e)(9) (2003) (school district bears burden); Ala. Admin. Code Rule 290–8–9.08(8)(c)(6)(ii)(I) (Supp. 2004); (same); Conn. Agencies Regs. §10–76h–14 (2005) (same); Del. Code Ann., tit. 14, §3140 (1999) (same); 1 D. C. Mun. Regs., tit. 5, §3030.3 (2003) (same); W. Va. Code Rules §126–16–8.1.11(c) (2005) (same); Ind. Admin. Code, tit. 511, 7–30–3 (2003) (incorporating by reference Ind. Code §4–21.5–3–14 (West 2002)) (moving party bears burden); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, Section 7(4) (2004) (incorporating by reference Ky. Rev. Stat. Ann. §13B.090(7) (Lexis 2003)) (same); Ga. Comp. Rules & Regs., Rule 160–4–7–.18(1)(g)(8) (2002) (burden varies depending upon remedy sought); Minn. Stat. Ann. §125A.091, subd. 16 (West Supp. 2005) (same). There is no indication that this lack of uniformity has proved harmful.

Nothing in the Act suggests a need to fill every interstice of the Act's remedial scheme with a uniform federal rule. See *Kamen* v. *Kemper Financial Services, Inc.*, 500 U. S. 90, 98 (1991) (citations omitted). And should some such need arise—*i.e.*, if non-uniformity or a particular state approach were to prove problematic—the Federal Department of Education, expert in the area, might promulgate a uniform federal standard, thereby limiting state choice. 20 U. S. C. A. §1406(a) (Supp. 2005); *Irving Independent School Dist.* v. *Tatro,* 468 U. S. 883, 891–893 (1984); see also *Barnhart* v. *Walton,* 535 U. S. 212, 217–218 (2002); *NationsBank of N. C., N. A.* v. *Variable Annuity Life Ins. Co.,* 513 U. S. 251, 256–257 (1995); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837, 842–845 (1984).

Most importantly, Congress has made clear that the Act itself represents an exercise in "cooperative federalism." See *ante* (opinion of the Court), at 2–3. Respecting the States' right to decide this procedural matter here, where education is at issue, where expertise matters, and where costs are shared, is consistent with that cooperative approach. See *Wisconsin Dept. of Health and Family Servs.* v. *Blumer*, 534 U. S. 473, 495 (2002) (when interpreting statutes "designed to advance cooperative federalism[,] . . . we have not been reluctant to leave a range of permissible choices to the States"). Cf. *Smith* v. *Robbins*, 528 U. S. 259, 275 (2000); *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). And judicial respect for such congressional determinations is important. Indeed, in today's technologically and legally complex world, whether court decisions embody that kind of judicial respect may represent the true test of federalist principle. See *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 420 (1999) (BREYER, J., concurring in part and dissenting in part).

Maryland has no special state law or regulation setting forth a special IEP-related burden of persuasion standard. But it does have rules of state administrative procedure and a body of state administrative law. The state ALJ should determine how those rules, or other state law applies to this case. Cf., *e.g.*, Ind. Admin. Code, tit. 511,7–30–3 (2003) (hearings under the Act conducted in accord with general state administrative law); 7 Ky. Admin. Regs., tit. 707, ch. 1:340, Section 7(4) (2004) (same). Because the state ALJ did not do this (*i.e.*, he looked for a federal, not a state, burden of persuasion rule), I would remand this case.